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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 786

Sociedad de Mario Mercado e Hijos, Appellants

v.

Commonwealth of Puerto Rico, etc., Appellee

Appeal From the Supreme Court of Puerto Rico

JURISDICTIONAL STATEMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

COMMONWEALTH OF PUERTO RICO, ETC., *Plaintiff-Appellee*

v.

SOCIEDAD MARIO MERCADO E HIJOS, *Defendants-Appellants*

CONDEMNATION PROCEEDINGS

Appeal From the Supreme Court of Puerto Rico

JURISDICTIONAL STATEMENT

TO THE HONORABLE COURT:

This case involves an appeal from the decision and opinion of the Supreme Court of the Commonwealth of Puerto Rico in the case of Commonwealth of Puerto Rico, et als. v. Sociedad Mario Mercado e Hijos, case number 64-24 not yet reported in the official reports of the said court.

The jurisdiction of this Honorable Court is invoked under the provisions of section 1258, paragraph 2, Title 28 U.S.C.A. This is an appeal from a judgment entered in con-

demnation proceedings in which the constitutionality of Law No. 99 of April 18, 1952 (Laws of Puerto Rico Annotated, Vol. 23, sec. 278 (g) and (n); Appendix hereto, Exhibit 1, p. 1a) which authorizes the condemnation of private property by the governor of Puerto Rico on behalf of the Puerto Rico Industrial Development Company to be sold or leased to private individuals for the purpose of establishing factories (tax exempted) on such properties, is assailed as repugnant to the Constitution of the United States of America, and the proceedings conducted in the case.

In this case, the Commonwealth of Puerto Rico condemned 70.8397 cuerdas of land on behalf of the Puerto Rico Industrial Development Company in 1959 of which, 68.3353 cuerdas were the property of defendant-appellant herein. The Commonwealth government deposited with the Clerk of the Court the sum of $121,827.40. This land was to be used by the Puerto Rico Industrial Development Company as an industrial site for tax exempted plants. The government filed a motion for immediate possession and acquisition which was granted by the Court of Eminent Domain by order dated September 11, 1959.

Appellant herein raised several constitutional issues under the Federal constitution in the trial court (Typewritten record on Appeal, pages 15-18; Appendix, Exhibit A, p. 5a) alleging that the proposed use was not a public one, as it is contemplated in the Constitution of the United States of America, and that the selection of the land condemned was done arbitrarily. It was also alleged that the amount deposited did not constitute the fair and just compensation contemplated in the Constitutions of the United States and the Commonwealth of Puerto Rico.

Appellant operates a sugar factory in the town of Guayanilla, Puerto Rico under the name of Central Rufina and is the owner and cultivates land in the southern part of Puerto Rico on which it raises its raw material (sugar

cane). The land condemned was dedicated totally to the production of this raw material. The appellant claimed before the trial court and states before this Honorable Court, that to deprive it of land where it raises its raw material for its factory and to give this land to private individuals for their own private use, is not constitutionally valid and is a clear abuse of the right to condemn private property.

The Constitutional issues were disposed of by the Court of Eminent Domain (Superior Court of Puerto Rico) by order of March 23, 1960 signed by P. Santos Borges, Judge. (Typewritten Record on Appeal, page 42; Appendix, Exhibit B, p. 8a).

Defendant-appellant filed an answer to the complaint dated April 16, 1960 in which, among other defenses, it stated that the compensation deposited did not constitute fair and reasonable compensation under the law. As special defenses it raised the following:

(1) The use was not a public use as contemplated in the Fifth Amendment to the United States Constitution.

(2) The use of the power to condemn to deprive an established industry of land where it raised its raw material for the purpose of delivering the said land to private enterprises is an illegal and unconstitutional exercise of that power.

(3) The determination and selection of the land to be condemned was arbitrary and prejudicial.

(4) The order of the court depriving defendant of its property prior to the determination of the fair and reasonable compensation was void as it violated the provisions of the U. S. Constitution and the Constitution of the Commonwealth of Puerto Rico. (Appendix, Exhibit C, p. 11a).

On March 17, 1961 defendant filed an amended answer to the complaint in which it raised the following defenses:

(1) Neither the statutory provisions cited in paragraph 1 of the complaint nor any other statutes of the Commonwealth of Puerto Rico authorize this expropriation.

(2) The statutes cited in paragraph 1 of the complaint as applied to this land and this defendant in this proceedings deprive defendant of property without due process of law in violation of Article II, Section 7 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that this expropriation is not for a public purpose.

(3) The expropriation in this case of this particular tract of land is arbitrary, capricious, unreasonable and irrational and thus deprives defendant of its property without due process of law in violation of article II, section 7 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(4) The expropriation in this case constitutes a taking of private property for a non-public use in violation of article II, section 9 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

(5) Law number 99 of April 18, 1952, contains insufficient standards to guide the administrative exercise of the power to acquire land by expropriation and thus constitutes an unlawful delegation of legislative power in violation of article III, section 1 of the Constitution of Puerto Rico.

(6) So much of Law Number 99 of April 18, 1952, as authorizes expropriations of property by or on be-

half of the Puerto Rico Industrial Development Company is unconstitutionally vague, and thus its application to this land and this defendant deprives defendant of property without due process of law in violation of article II, section 7 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth amendments to the Constitution of the United States.

(7) The land expropriated in this case is an integral part of a larger tract of land owned by the defendant devoted to agriculture and industrial use. This expropriation has caused damage to defendants remaining land and to the agricultural, commercial and industrial enterprise connected therewith.

Copy of said amended answer is attached to this Statement in the Appendix as Exhibit DD (p. 16a).

Prior to the hearing of the case on the merits, defendant-appellant submitted an interrogatory upon plaintiff under the Rules of Civil Procedure of Puerto Rico (Appendix, Exhibit E, p. 19a), to which plaintiff raised several objections (Appendix, Exhibit F, p. 21a) that were sustained by the Court of Eminent Domain. The questions were directed to discover evidence as to the alleged arbitrary selection of the land. Upon Writ of Certiorari to the Supreme Court of Puerto Rico (Appendix, Exhibit G, p. 26a), that court by order issued July 14, 1961 (Appendix, Exhibit H, p. 31a), ordered Plaintiff to answer certain questions but sustained the objections related to the arbitrary selection of the land, holding that it is not for the courts . . . to sort and choose among the various parcels selected for condemnation and that the rights of property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of taking. The court held that this case concerned "a condemnation undertaken by a public agency for obvious public purposes, that is, for industrial development." It based this affirmation on a previous case decided by it, *Common-*

wealth v. *Fajardo Sugar Co.*, 79 P.R.R. 303 (1956), and *People* v. *Eastern Sugar Associates*, 156 F. 2d 316 (C.C.A. 1, 1946), cert. denied in 329 U.S. 772.

The court further stated that defendant-appellant was in estoppel to raise the said defense, since it had withdrawn the amount deposited by the State, and that the acceptance of the said sum precluded defendant from arguing any other issue which does not relate exclusively to the amount of the compensation. The court in so ruling, accepted as established, facts not present in the case, because the "motion for withdrawal of funds" (Appendix, Exhibit D, p. 14a) very clearly states in its paragraph 2, "that defendant wishes to withdraw the aforesaid sum without prejudice to its allegations in this case." The Court overlooked the contents of the motion and the fact that defendant had been already deprived of the use and benefit of the property by the order of the Court of Eminent Domain transfering immediate title and possession to plaintiff.

Defendant moved for reconsideration of the said order on May 11, 1962 (Appendix, Exhibit J, p. 39a), stating that the situation in this case was not similar to the facts of *Berman* v. *Parker*, 348 U.S. 26 and that the court had power to set aside the selection when the officials had acted in a capricious manner as had been proved in this case. *United States* v. *Carmack*, 329 U.S. 230, 67 S. Ct. 252; *United States* v. *Willis*, 211 F. 2d 1, and *United States* v. *Certain Real Estate, etc.*, 217 F. 2d 920. The motion was denied by Order dated May 29, 1962. (Appendix, Exhibit K, p. 41a).

The case came up for hearing on January 31, 1963 and the case extended throughout February 1, 26, 27 and 28 and March 1, May 13, 14, 15 and 16. The Court of Eminent Domain entered judgment on September 11, 1963 and in a long opinion determined that the best use of the condemned land at the time of the condemnation "was agricultural, but

with an increased value for these purposes in view of the possibility that within a reasonable period of time it could be dedicated to industrial or residential development purposes." The Court then proceeded to dismiss the allegations of value made by defendant-appellant $409,250.00 as against the $121,827.40 deposited by the Plaintiff. The Court did not determine the value of the condemned property at all. It is presumed in the judgment that the amount deposited could be the amount adjudged. Copy of the Findings of Facts, Conclusions of Law and Judgment of the Superior Court of Puerto Rico, Eminent Domain Section, is attached herewith in the Appendix as Exhibit L, pp. 42a-60a), and is also found in the Typewritten Record on Appeal at pages 86-109.

Defendant appealed to the Supreme Court of Puerto Rico on October 3, 1963 by filing its Notice of Appeal (Appendix, Exhibit M, p. 61a) and in the said Notice of Appeal raised the following question of law:

> (1) The judgment deprived appellant of its property without due process of law.
>
> (2) The court in determining that the best use was "agricultural" did so against the evidence introduced, without any basis therefore in the record, in an arbitrary and capricious manner thus depriving appellant of a fair and impartial trial under both the Constitution of the United States and the Constitution of the Commonwealth of Puerto Rico.
>
> (3) The court in disbelieving appellant's evidence without justification denied it the due process of law and deprived it of its property in violation of the Federal Constitution and the Constitution of the Commonwealth of Puerto Rico.
>
> (4) The condemnation in this case does not constitute a public use as contemplated in the Fifth Amendment to the Constitution of the United States of

America incorporated in the Fourteenth Amendment of that same Constitution.

(5) The use of the power of condemnation to deprive an established industry of its source of raw material in order to later deliver the lands in question to private enterprises for the operation of industrial establishments, is an unlawful exercise of the power of condemnation and the action of the Industrial Development Company constitutes a violation of the restriction included in the Act authorizing it to expropriate.

The Supreme Court of Puerto Rico, on May 13, 1965 entered judgment affirming the judgment of the Court of Eminent Domain (Typewritten Record on Appeal, pages 112-113; Appendix, Exhibit N, p. 63a). The court decided that the first three errors had been adversely decided against defendant-appellant in the Certiorari filed previously (Appendix, Exhibit G, p. 26a), and the court again made reference to the fact that the funds deposited had been withdrawn by appellant, and that therefore, appellant could not raise the issue of the illegality of the taking.

As to the other two errors assigned to the Court of Eminent Domain, the Supreme Court of Puerto Rico affirmed the determination of "agricultural" use made by that court, but made no ruling as to the fourth and fifth assignments of errors pointed out in the Notice of Appeal, that is, the use of the power to condemn in this case for a use not public and the use of that power to deprive an established industry of its source of raw material and give that land to another private enterprise for its own private use.

The judgment entered by the Supreme Court failed to decide the issues in the order and manner presented to that court. In so doing, the Supreme Court deprived appellant of its right to a fair and impartial appraisal of its case.

A motion for reconsideration filed on May 24, 1965 was denied by the Supreme Court of Puerto Rico on May 27, 1965.

Appellant filed its Notice of Appeal to this Supreme Court of the United States with the Clerk of the Supreme Court of Puerto Rico on June 4, 1965 stating in the said Notice of Appeal the grounds for the same. (Appendix, Exhibit O, p. 66a).

The Supreme Court of Puerto Rico by order of June 11, 1965 (Appendix, Exhibit P, p. 71a) considering the Notice of Appeal filed, recalled from the trial court the original record for the preparation of the record on appeal and granted appellant by order dated September 30, 1965, till November 1, 1965 to file the record on appeal before this Honorable Court (Appendix, Exhibit Q, p. 71a).

In this case sufficient constitutional issues under the Constitution of the United States and the Constitution of the Commonwealth of the Puerto Rico were raised at the trial court and before the Supreme Court of Puerto Rico and are raised in this Statement to give jurisdiction to this Honorable Court. *Phillips Chemical Co.* v. *Dumas Independent School District* (Tex. 1960), 80 S. Ct. 474; 361 U.S. 376, 4 L. Ed. 383; *Brown Shoe Co.* v. *U. S.* (Mo. 1962), 82 S. Ct. 1502; 370 U.S. 294, 8 L. Ed. 2d 510; *Braniff Airways* v. *Nebraska State Bd. of Equalization and Assessment*, 74 S. Ct. 757; 347 U.S. 590, 98 L. Ed. 970.

WHEREFORE, it is prayed from this Honorable Court to review the judgment of the Supreme Court of Puerto Rico in this case.

Ponce, Puerto Rico, this 30th day of November, 1965.

Respectfully submitted,

PEDRO M. PORRATA and
CHARLES R. CUPRILL,
Attorneys for Appellant
P. O. Box 1124, Ponce, P. R.

By: CHARLES R. CUPRILL OPENHEIMER

APPENDIX

Exhibit 1

No. 99

Approved April 18, 1952

AN ACT TO AMEND CLAUSE (g) OF SECTION 10 OF ACT NO. 188, APPROVED MAY 11, 1942, AS SUBSEQUENTLY AMENDED, KNOWN AS THE PUERTO RICO INDUSTRIAL DEVELOPMENT COMPANY ACT; TO ADD CLAUSES (n), (o) AND (p) TO SAID SECTION 10, AND FOR OTHER PURPOSES.

STATEMENT OF MOTIVES

The industrialization of Puerto Rico to its maximum capacity and the speediest acceleration possible is an important part of the policy of the Government of Puerto Rico as a practical means of providing new sources of employment and wealth for the increasing population of the island.

To the end of obtaining that objective, an adequate and well planned distribution of industrial plants throughout the Island becomes necessary and for such purpose it is necessary to facilitate the acquisition of those lands which the Puerto Rico Planning Board may deem it advisable to allot or approve for industrial purposes, with the rapidity which the adequate momentum of the industrial development program may demand and upon payment for such lands at a reasonable price, not subject to speculation on the part of the owners thereof.

One of the most serious problems which the Puerto Rico Industrial Development Company is confronting in the development of its said industrialization program is precisely the difficulty encountered in acquiring by purchase through direct negotiation the lands needed by it therefor,

mostly due to apathy or to the express refusal to sell on the part of the owners, and in other cases, because of difficulties in reaching an agreement with them as regards reasonable prices for said lands.

The Legislature of Puerto Rico, conscious of the importance the success of the intensified industrialization program sponsored by the government through the Industrial Development Company entails to the economic life of all Puerto Rico, desires to declare, as it hereby declares, that said program is one of prime importance in the economic reconstruction of the island, and that, therefore, it participates of the nature of a public utility and necessity.

For such reason and in order to enable the said government agency to fulfill that mission of the utmost public interest with the required rapidity, efficacy and efficiency, the Legislature of Puerto Rico feels that it is its duty expressly to grant hereby to the Puerto Rico Industrial Development Company, through the pertinent amendments to its organic Act, the necessary powers to enable said agency to acquire by condemnation those properties which in its judgment are required in order fully to develop its activities within its aforesaid program.

BE IT ENACTED BY THE LEGISLATURE OF PUERTO RICO:

Section 1.—Clause (g) of Section 10 of Act No. 188, approved May 11, 1942, as subsequently amended, known as the Puerto Rico Industrial Development Company Act, is hereby amended to read as follows:

"(g) To acquire in any lawful manner, including, but without limitation, acquisition by purchase, condemnation, lease, bequest, devise or gift, and to hold, maintain, use and operate any property, real, personal, or mixed, tangible or intangible, including, but without limitation, securities and other personal property or any interest therein, deemed by it to be necessary or desirable for carrying out the pur-

poses of the Company. The power to acquire property by condemnation shall not apply to the acquisition of buildings wherein enterprises of a commercial, industrial or agricultural nature are being operated in good faith."

Section 2.—Three new clauses which shall be known as clauses (n), (o), and (p) are hereby added to Section 10 of Act No. 188, approved May 11, 1942, as subsequently amended, known as Puerto Rico Industrial Development Act, to read as follows:

"(n) When in the judgment of the Company it should be necessary to take immediate possession of the properties to be condemned, the Company shall request from the Governor of Puerto Rico, to acquire, by purchase, condemnation, or by any other lawful means, for the use and benefit of the Company, all real property and property rights necessary and convenient for carrying out the ends and purposes thereof. The Company shall place beforehand at the disposal of The People of Puerto Rico the necessary funds estimated as the value of the property or rights to be acquired. The difference in value which may be decreed by the Court may be paid from the public treasury, but the Company shall be under obligation to reimburse said difference. After reimbursement in full is made, title to said property shall be transferred to the Company, upon order of the court to that effect. The power hereby conferred shall not limit or restrained in any wise whatsoever the inherent power of the Company to acquire property".

"(o) All real and personal property and all rights or interest therein which the Company may deem necessary to acquire for carrying out its purposes, are hereby declared of public utility, and the same may be condemned by the Company, or at the request and for the use and benefit thereof, by The People of Puerto Rico, represented by the Governor, without the previous declaration of public utility

provided in Section 9 of the General Law of Eminent Domain".

"(p) Condemnation proceedings instituted by virtue of the provisions of clauses (g), (n) and (o) of this Section shall be carried out in accordance with the provisions of the General Law of Eminent Domain of March 12, 1903, as amended, and to such effect the Company shall enjoy all the rights and assume all the obligations prescribed by said Act with respect to all expropriating authority."

Section 3.—This Act, being of an urgent and necessary character, shall take effect immediately after its approval.

Approved, April 18, 1952.

Exhibit A

SUPERIOR COURT OF PUERTO RICO
EMINENT DOMAIN SECTION

Case No. E59-823 to E59-825

THE COMMONWEALTH OF PUERTO RICO, represented by its governor, *Plaintiff*,

v.

70.8397 cuerdas of land located in Bo. Canas, PONCE and MARIO MERCADO E HIJOS, *et al.*, *Defendants*.

CONDEMNATION

Motion to Set Aside Order of Delivery and Material Acquisition

HON. COURT:—

Now comes Sociedad Mario Mercado e Hijos through its undersigned counsel and respectfully states:

1. That in this case the Commonwealth of Puerto Rico, at the request of the Puerto Rico Industrial Development Company and for the latter's use and benefit, has instituted condemnation proceedings to acquire 70.8397 cuerdas of land in Barrio Canas, Ponce, which belong to the party appearing herein.

2. That according to the second paragraph of the complaint filed in this case, the Puerto Rico Economic Development Administrator has deemed that the aforesaid parcel of land is useful, necessary, and desirable for dedication to industrial purposes in Barrio Canas, Ponce, Puerto Rico.

3. That at the present the condemned parcel of land is dedicated to the planting of sugar cane for industrial purposes by Sociedad Mario Mercado e Hijos, owner and operator of Central Rufina, Guayanilla, Puerto Rico.

4. That in one of the "whereases" of the Order of September 11, 1959, ordering delivery of the title to and im-

mediate possession and use of the property to plaintiff within a 30-day period of time, this Hon. Court provides as follows:

> "WHEREAS, the purpose for which the property involved in this proceeding is sought to be condemned, to wit: enabling the Puerto Rico Industrial Development Company to carry out the ends and purposes for which it was created and, more specifically, for industrial purposes in Bo. Canas, Ponce, Puerto Rico, in order to provide new sources of employment and wealth for the increasing population of Puerto Rico through its industrialization program, is comprised within the restrictions prescribed by the statutes under which the instant proceeding is being litigated;"

5. That at present the aforesaid parcel is dedicated and has been dedicated for time immemorial to industrial purposes by a Puerto Rican industry, i.e., Central Rufina which is engaged in the manufacture of sugar, a vital product in in connection with the necessities of the American nation in times of peace as well as in times of war and which must necessarily have priority over any product sought to be manufactured in whatever plants may be established in the condemned parcel. This industry, which has been established for over 50 years, provides thousands of laborers in the southern coast of the Island with work, pays considerable sums of money into the public treasury as land taxes, income taxes, in addition to other taxes imposed on it for the benefit of the workers of this industry in general, and pays a considerable amount of money to the Water Resources Authority for consumption of electric current for its irrigation pumps.

6. That Sociedad Mario Mercado e Hijos has on numerous occasions requested the Governor of Puerto Rico and the Industrial Development Company to desist from the aforesaid condemnation alleging that a native industry

would be deprived of its raw-material source, there being other lands available, in order to benefit other private industries yet to be established, and that such action constituted a discrimination among industries.

7. That Sociedad Mario Mercado e Hijos offered other lands located in the same area, not dedicated to sugar cane, and these were arbitrarily rejected insisting on the condemnation of the lands planted with sugar cane.

8. That the action of the Government and of the Industrial Development Company in this case constitutes and unlawful exercise of the power of condemnation for public purposes.

9. That through the condemnation of lands planted with sugar cane for industrial purposes so that Industrial Development may assign them thereafter to other industries, defendant is being deprived of its property without due process of law, a discrimination among industries, is established, and the private property of a person is delivered to another private entity for its own use and benefit.

10. That the purpose striven for by means of this condemnation is not a public purpose.

11. That in selecting the land to be condemned, the Puerto Rico Industrial Development Company has abused its discretion, arbitrarily rejecting other lands with identical soil and in the same area that had been offered to it without even going to examine them. The fact that it was only recently that they went over to examine and study the condemned lands, is proof of this.

12. That neither the Government of Puerto Rico nor Industrial Development may legally or constitutionally deprive a private industry of its lands-lands which enjoy a water right granted by the Spanish Crown for industrial purposes and protected by the Treaty of Paris, and which are the lands on which its raw material is located—to deliver them to other private companies for use by the latter.

WHEREFORE we pray the Hon. Court to set aside the order of September 11, 1959, decreeing the acquisition and delivery of the condemned parcel and to set this motion for hearing.

That pending decision of this motion, the term within which to answer the complaint be arrested.

Ponce, Puerto Rico, September 30, 1959.

Respectfully requested,

PEDRO M. PORRATA and
CHARLES R. CUPRILL
Counsel for Defendant

by: (s) CHARLES R. CUPRILL
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Exhibit B

IN THE SUPERIOR COURT OF PUERTO RICO
EMINENT DOMAIN SECTION

Case No. E59-823 to E59-825

THE COMMONWEALTH OF PUERTO RICO, represented by its Governor, *Plaintiff*,

v.

70.8397 cuerdas of land located in Bo. Canas, Ponce, and MARIO MERCADO E HIJOS, ADRIÁN MERCADO RIERA, EUFEMIA RIERA DUBOCQ, PUERTO RICO RAILROAD AND LAND DEVELOPMENT CORPORATION, PORTO RICO TELEPHONE CO., JOHN DOE AND RICHARD ROE, *Defendants.*

CONDEMNATION

Order

On October 8, 1959, defendant filed a motion to set aside the order issued by this Court on September 11, 1959, order-

ing the acquisition and delivery of the property condemned in the above-entitled case, and in connection therewith it set forth the following grounds:

> "1. The condemnation in this case does not constitute a public use as contemplated in the Fifth Amendment to the Constitution of the United States of America, incorporated in the Fourteenth Amendment of that same Constitution.
>
> "2. The use of the power to condemn, depriving an established industry of its raw material source in order to deliver such lands to private enterprises for the operation of industrial establishments, is an illegal and unconstitutional exercise of the aforesaid power.
>
> "3. The determination made in the selection of the lands in this case is completely arbitrary and prejudicial not only to the owner's interests, but to the community in general, and deprives defendant of its property with the due process of law."

1. With regard to the first ground it is enough to say that our Honorable Supreme Court, in Commonwealth v. Fajardo Sugar Co., 79 P.R. R. 303, where the same issues were raised, decided that they lacked merit.

2. The fact that the sugar industry has been recognized by the legislature as the backbone of our economy and that, inasmuch as it partakes of a great public interest, it may be regulated by the Commonwealth, does not overcome or lessen the supreme prerogatives of sovereignty inherent in the Commonwealth itself to acquire private property for public use, by means of just compensation.

No one can doubt the authority of our Legislature to determine what are public necessities, or the power it has to delegate in organizations, agencies and instrumentalities of the executive branch the power to enforce its mandate. Among others, it has the power to select the necessary property to carry out the public purpose embodied in pertinent laws.

In this specific case the governmental agency in question is the Industrial Development Company, whose administrator deemed it useful, necessary, and desirable in order to carry out its industrial purposes in Barrio Canas, Ponce, to acquire the parcel described in the complaint, and this determination received the approval of the Puerto Rico Planning Board.

The only restriction imposed on the Industrial Development Company to acquire properties for public use refers to buildings wherein enterprises of a commercial, industrial, or agricultural nature are being operated in good faith.

During the discussion of these issues and by means of evidence it was established that there was a cane plantation on the condemned parcel and that certain irrigation canals were located thereon; that since the one and the others were necessary for the operation of an industrial enterprise, the Company was legally estopped from acquiring them by condemnation.

The Act refers to buildings. "Building" is defined as "work or construction built with dwelling or similar purposes; as a house, temple, theater, etc." "To build" is the act or action of building.

Definitively, irrigation canals do not fit these meanings. Act No. 99 of 1952 does not even mention plantations of fruits as a bar for the acquisition of lands on which the former stand.

3. Defendant tells us that the action of the Industrial Development Company and of the Planning Board in acquiring the parcel involved in this proceeding was arbitrary, which fact, according to defendant, was proved by means of the evidence introduced at the hearing of November 23, 1959.

We do not even remotely attach such scope to the evidence introduced. The fact that next to the condemned

property is another property deemed by defendant to be more convenient to the Commonwealth and that this other parcel has been offered to the condemning party, and that this offer has not been considered or accepted by plaintiff, cannot be characterized as arbitrary or capricious.

Defendant's motion is hereby denied and it is given a period of ten days to answer the complaint.

Let this order be served.

San Juan, Puerto Rico, March 23, 1960.

(s) P. SANTOS BORGES
Judge.

Exhibit C

IN THE SUPERIOR COURT OF PUERTO RICO

EMINENT DOMAIN SECTION

Cases No. E-59-823 to E-59-825

CONDEMNATION

THE COMMONWEALTH OF PUERTO RICO, REPRESENTED BY ITS GOVERNOR; *Plaintiff*

v.

70.8397 CUERDAS OF LAND LOCATED IN BO. CANAS, PONCE, AND MARIO MERCADO E HIJOS, ET AL., *Defendants.*

Answer

To the Hon. Court:

Now comes defendant Mario Mercado e Hijos, through its undersigned counsel, and respectfully states and prays:

1. The first fact of the complaint is denied.

2. The second fact of the complaint is denied.

3. The third fact of the complaint is denied.

4. The fourth fact of the complaint is denied for lack of sufficient information to accept it.

5. Defendant denies that the sum of $125,455.90 constitutes fair and reasonable compensation for the condemned lands and alleges, to the contrary, that the properties condemned in this proceeding are valued at not less than $10,000 per cuerda.

6. Defendant denies the existence of other persons or entities with an interest in the condemned lands, only defendant Mario Mercado e Hijos having an interest on those lands.

SPECIAL DEFENSES

As special defenses defendant alleges that:

1. The condemnation in this case does not constitute a public use as contemplated in the Fifth Amendment to the Constitution of the United States of America, incorporated in the Fourteenth Amendment of that same Constitution.

2. The use of the power to condemn, depriving an established industry of its raw material source in order to deliver such lands to private enterprises for the operation of industrial establishments, is an illegal and unconstitutional exercise of the aforesaid power.

3. The determination made in the selection of the lands in this case is completely arbitrary and prejudicial not only to the owner's interests, but to the community in general, and deprives defendant of its property with the due process of law.

4. The order issued by this Hon. Court depriving defendant of the immediate possession and title to its property

without first determining the fair and reasonable value thereof is null and void because it violates the provisions of the Constitution of the Commonwealth of Puerto Rico and of the Federal Constitution.

WHEREFORE, defendant respectfully prays this Hon. Court to enter judgment pursuant to law dismissing the complaint filed in this case; and should dismissal not lie, to enter judgment declaring that the just and reasonable value of the condemned property in this case is $10,000 per cuerda of the condemned land, ordering plaintiff to deposit the difference between the value deposited and the value alleged herein, with any other pronouncements proper in law.

Ponce, Puerto Rico, April 16, 1960.

Respectfully prayed,

PEDRO M. PORRATA and
CHARLES R. CUPRILL
Counsel for Defendant

By: (s) CHARLES R. CUPRILL
Of Counsel
Concordia & Luna Streets
Ponce, Puerto Rico

I CERTIFY: That on this same date I deposited in the post office in Ponce, Puerto Rico, a duly-stamped envelope addressed to Mr. A. Sandín del Manzano, counsel for plaintiff in this case, to his address at the Department of Justice of Puerto Rico, containing a true and faithful copy of the preceding Answer. That between Ponce and San Juan, Puerto Rico, there is a regular, daily mail service operated by the Federal Government.

Ponce, Puerto Rico, April 16, 1960.

(s) CHARLES R. CUPRILL
Of Counsel

Exhibit D

(SAME TITLE)

Motion for Withdrawing of Funds

Hon. Court:

Now comes defendant through its undersigned counsel and respectfully states and prays:

1. That in this case the sum of $121,827.40 was deposited as the fair value of the condemned land, and this sum has not been withdrawn by defendant.

2. That defendant wishes to withdraw the aforesaid sum without prejudice to its allegations in this case.

WHEREFORE, we pray the Hon. Court to issue a check in favor of Mario Mercado e Hijos in the amount of $121,827.40, deposited in its name in this case.

Ponce, Puerto Rico, February 13, 1961.

Respectfully requested,

PEDRO M. PORRATA and
CHARLES R. CUPRILL
Counsel for Defendant

By: (s) CHARLES R. CUPRILL
Of Counsel

I CERTIFY: That on this same date I mailed, post paid, a copy of this motion to the Hon. Secretary of Justice of Puerto Rico, counsel for plaintiff in this case, and that between Ponce and San Juan, Puerto Rico, there is a regular and daily mail service operated by the Federal Government.

Ponce, Puerto Rico, February 13, 1961.

(s) CHARLES R. CUPRILL
Of Counsel

(SAME TITLE)

Minutes of Hearing

This case was heard and plaintiff appeared through Mr. Sandín del Manzano, and defendants, through Mr. Charles Cuprill.

Defendants appear solely to withdraw the funds deposited.

The Court, after declaring extinguished by death of the beneficiary the pension of $5,000.00 per annum in favor of Eufemia Riera; the notice of complaint against the *sociedad;* the attachment for income taxes, etc., and John Doe and Richard Roe, orders the office of the Clerk to issue a check in favor of the defendant in the sum of $121,827.40 and deliver it to Mr. Cuprill.

I CERTIFY: That the foregoing is a true and faithful copy of the contents of page No. 204, Minute Book of this Section, the Hon. Judge P. Santos-Borges presiding and Mr. Rogelio Carrión acting as stenographer.

And to be attached to the above-entitled case, I issue these presents in San Juan, Puerto Rico, on this 17th day of March, 1961.

LUIS M. CABAÑAS
Clerk

By: (s) V. AVILÉS
Assistant Clerk

Exhibit DD

(SAME TITLE)

Amended Answer to the Complaint

To the Honorable Court:

Now comes the defendant Mario Mercado e Hijos through its undersigned counsel and respectfully states and prays:

1. The defendant admits that the proceeding of condemnation is initiated by the Commonwealth of Puerto Rico, represented by the Governor of Puerto Rico, upon request from the Puerto Rico Industrial Development Company, for its use and benefit, and admits that the proceeding is purportedly initiated under the provisions and authority granted by law 188 of May 11, 1942, as amended by law 99 of April 18, 1952, Reorganization Plan Number 10 of 1950 and the General Condemnation law of March 12, 1903, as amended; but the defendant denies that any of the said laws authorizes this proceeding of condemnation.

2. Paragraph two of the complaint is denied.

3. Paragraph three of the complaint is accepted.

4. Paragraph four of the complaint is denied for lack of information to be accepted.

5. The defendant denies that the fair and just compensation for the lands condemned is the sum of $125,455.90 as stated in paragraph 5 of the complaint, and alleges to the contrary that the value of the lands is far in excess of this amount.

6. The defendant neither admits nor denies the allegations contained in paragraph 6 of the complaint, for lack of knowledge of the facts stated therein.

Legal Defenses

As legal or special defenses defendant alleges:

1. Neither the statutory provisions cited in paragraph 1 of the complaint nor any other statutes of the Commonwealth of Puerto Rico authorize this expropriation.

2. The statutes cited in paragraph 1 of the complaint as applied to this land and this defendant in this proceeding deprive the defendant of property without due process of law in violation of Article II, Section 7 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States in that this expropriation is not for a public purpose.

3. The expropriation in this case of this particular tract of land is arbitrary, capricious, unreasonable and irrational and thus deprives defendant of its property without due process of law in violation of Article II, Section 7 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. The expropriation in this case constitutes a taking of private property for a non-public use in violation of Article II, Section 9 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Law Number 99 of April 18, 1952, contains insufficient standards to guide the administrative exercise of the power to acquire land by expropriation and thus constitutes an unlawful delegation of legislative power in violation of Article III, Section 1 of the Constitution of Puerto Rico.

6. So much of Law Number 99 of April 18, 1952 as authorizes expropriation of property by or on behalf of the Puerto Rico Industrial Development Company is unconstitutionally vague, and thus its application to this land and this defendant deprives defendant of property without due process of law in violation of Article II, Section 7 of the Constitution of Puerto Rico and in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States.

7. The land expropriated in this case is an integral part of a larger tract of land owned by the defendant devoted

to agricultural and industrial use. This expropriation has caused damage to defendant's remaining land and to the agricultural, commercial and industrial enterprise connected therewith.

WHEREFORE, defendant to this Hon. Court prays that on due date and after all pertinent steps have been taken, to enter a judgment dismissing the complaint in this case and ordering title revested in the defendant; and if dismissal and revesting title are not in order, then to enter judgment for the just and fair compensation for the property condemned plus an additional amount for damage to defendant's remaining land, all in such amounts as determined by the Court to be just and proper, and ordering the plaintiff to deposit the difference between the amount already deposited and the value and damage here alleged with any other pertinent pronouncement.

Ponce, Puerto Rico, this 17th day of March, 1961.

Respectfully submitted,

PEDRO M. PORRATA &
CHARLES R. CUPRILL
Attorneys for defendant

By: (s) CHARLES R. CUPRILL

Of counsel:

CUPRILL & WILSON
Suite 425, González Building
Ponce, Puerto Rico

CHARLES H. MORIN, ESQUIRE
MORIN, OWENS, MCLAUGHLIN
& O'REILLY
19 Congress Street
Boston 9, Massachusetts

Exhibit E

(SAME TITLE)

Interrogatories to Plaintiff

Defendant Mario Mercado e Hijos submits the following Interrogatory pursuant to the provisions of Rule 30 of the Rules of Civil Procedure, to be answered by plaintiff.

1. State the name of the expert or experts employed in the appraisal of the lands involved in this case.

2. State the name of the persons who took part in the selection of the lands in this case.

3. State the procedure employed in this case for the selection of the condemned lands and on what basis was their public usefulness determined.

4. State whether plaintiff was not offered, prior to the condemnation, other lands in the same farm, not planted with cane.

5. What factors were employed to reach the conclusion that the condemned lands were better?

6. State how plaintiff arrived at the conclusion that the condemned land is worth $125,455.90 and what elements or factors were utilized.

7. Furnish copy of the appraisers' report in this case.

8. Furnish copy of sales or transactions employed to reach that conclusion and state which do you intend to use in the case.

9. State whether plaintiff took into consideration the impact on Central Rufina and on the sugar industry in

general upon condemning 70 cuerdas of land planted with cane.

10. State whether upon making the selection of the lands, the Department of Agriculture of P. R. was consulted, and if so, what was its answer.

11. How does plaintiff explain that while on the one hand the Legislature of Puerto Rico spends millions of dollars as incentive for the planting of canes, on the other hand plaintiff strips a farmer of 70 cuerdas of cane, yielding approximately 3,000 tons of cane?

12. Furnish a list of industrial propositions which plaintiff intends to carry out in the condemned land and the type of activity to which they would be devoted, indicating the number of workers to be employed, annual payroll, and materials to be used.

13. State whether soil tests were made and in which places. Furnish copy of the report.

14. Furnish a copy of the report of the Planning Board approving the acquisition of the lands.

15. Furnish a copy of the requirement referred to in paragraph No. 1 of the complaint.

16. State whether the condemned lands are adjacent and continguous to a first-rate highway.

17. State whether there are facilities of electricity, power, and telephone in that locality.

18. State the distance between the condemned lands and San Antonio Urbanization, Grillars Urbanization, Parque Atlético Montaner, Dr. Pila High School, the Vocational School, Hostos Avenue.

19. State whether or not the condemned land is flat.

Ponce, Puerto Rico, May 11, 1961.

Respectfully submitted,

PEDRO M. PORRATA
CARLOS ROMERO BARCELÓ
CHARLES R. CUPRILL

By: (s) CHARLES R. CUPRILL
Of Counsel

SERVICE

I CERTIFY: That on this same date I mailed, post paid, a copy of this motion to Mr. Arturo Estrella, counsel for plaintiff and Assistant Solictor General of Puerto Rico, to his address in San Juan, Puerto Rico.

Ponce, Puerto Rico, May 11, 1961.

By: (s) CHARLES R. CUPRILL
Of Counsel

Exhibit F

(SAME TITLE)

Objections and Answer to Defendant's Interrogatory

To the Hon. Court:

Now comes plaintiff, through its undersigned counsel and respectfully submits to the Hon. Court the following objections and answer to the Interrogatory filed by defendant:

OBJECTIONS AND ANSWER TO INTERROGATORY

1. The name of the expert used in the appraisal of the lands involved in this case is Francisco A. Feliú.

2. We object to the second question inasmuch as the manner or method of selecting the condemned lands is not

material or relevant to determine value and, in addition, because this question has been already decided against defendant.

3. This question is objected to on the same grounds as the second question.

4. It is objected to on the same grounds set forth as to the second and third questions.

5. It is objected to on the same grounds set forth as to the second, third, and fourth questions.

6. The factors involved in plaintiff's conclusions regarding value consisted in comparable sales.

7. This question is objected to because defendant's request concerning the report of plaintiff's appraiser is improper.

8. The following sales or transactions were taken into consideration with respect to the conclusions as to value in the instant case:

(a) Sucesión de Desiderio Canales sells to Félix S. Serrallés 60.5520 cuerdas on October 19, 1957 (page 171, volume 682, property 19386).

(b) Reparada Development sells to Cooperativa de Hogares de la Perla del Sur 21.636 cuerdas on June 26, 1958 (Deed No. 570 before Notary Public Jorge Bartolomei).

(c) Industrial Development Company sells to Insuldyne Corp. 9.441 cuerdas of land at the end of 1957 (page 129, volume 676, property No. 19252).

(d) Industrial Development Company sells to Shut Mix Corp. 3.39 cuerdas on March 17, 1957 (page 166, volume 587, property No. 17514, 1st entry).

(e) Inmaculada Bota Canet sells to Puerto Rico Road Constructors Inc. 96.578 cuerdas on September

26, 1957 (Deed No. 67 before Notary Public Lorenzo Lagarde Garcés).

These or any other future comparable sales will be utilized by plaintiff at the hearing.

9. Question No. 9 is objected to for the reason that the matter involved therein is immaterial and irrelevant in this case and, in addition, because this question has been already decided in a previous incident in connection with this case.

10. Question No. 10 is objected to because the matter involved therein is irrelevant and immaterial as regards appraisal and, in addition, because this question was decided against defendant in an incident that took place in connection with the instant case.

11. Question No. 11 is objected to because the question raised therein is irrelevant and immaterial to determine value.

12. Defendant's request in this question is immaterial and irrelevant to determine value, for which reason we object thereto.

13. Concerning this question, it is the Industrial Development Company that defendant should address with regard thereto.

14. The information requested by defendant in this question is at its disposal in the Puerto Rico Planning Board and it is incumbent on defendant to obtain it from said instrumentality.

15. Question No. 15 of defendant's interrogatory is objected to.

16. The information requested by defendant in question No. 16, if true, is within defendant's reach and may be easily obtained by it.

17. Likewise, the information requested by defendant in question No. 17 is within its reach and might be easily obtained.

18. The information requested by question No. 18 of the interrogatory is within defendant's reach and may be easily obtained by it.

19. The topography of the lands the object of condemnation in this case is level.

WHEREFORE, we respectfully submit to the Court this Answer to the Interrogatory.

San Juan, Puerto Rico, June 14, 1961.

FRANCISCO ESPINOSA, JR.
Acting Secretary of Justice

ARTURO ESTRELLA
Assistant Solicitor General

V. M. SÁNCHEZ FERNÁNDEZ
Head, Land Division

(s) A. SANDÍN DEL MANZANO
Counsel, Department of Justice

I, A. Sandín del Manzano, of age, an attorney-at-law, married, and a resident of this city, do under oath declare:

That my name and personal circumstances are as above stated; that I am one of the plaintiff's counsel in this case; that I have prepared the foregoing Answer to the Interrogatory and that I think in good faith that the answers are true, after having examined the record of the case.

IN WITNESS WHEREOF I subscribe and swear to these presents in San Juan, Puerto Rico, June 14, 1961.

(s) A. SANDÍN DEL MANZANO
Counsel, Department of Justice

Subscribed and sworn to before me by A. Sandín del Manzano, of the above-mentioned personal circumstances, who is to me personally known, in San Juan, Puerto Rico, June 14, 1961.

(s) LUIS M. CABAÑAS
Acting Clerk

(Seal of the Superior Court)

SERVICE

I CERTIFY: That as of today I mailed a true and faithful copy of the foregoing Answer to the Interrogatory in a duly sealed and stamped envelope to Mr. Charles R. Cuprill, counsel for defendant in this case to his address, Box 1224, Ponce, Puerto Rico.

San Juan, Puerto Rico, June 14, 1961.

(s) A. SANDÍN DEL MANZANO
Counsel, Department of Justice

(SAME TITLE)

Order

On May 11, 1961, defendant submitted a set of interrogatories which were answered in part and partly objected to by plaintiff.

In order to hear the parties with regard to the merits of the objections raised, a hearing was set and held on June 20, 1961, at which the parties submitted without argument the questions raised in the objections.

For the reasons stated in our orders of March 23, 1960, and March 3, 1961, the objections raised by plaintiff are hereby sustained.

Let this order be served.

Issued in San Juan, Puerto Rico, June 21, 1961.

(s) P. SANTOS BORGES
Judge

Parties served today 6/22/61.

Exhibit G

IN THE SUPREME COURT OF PUERTO RICO

2867

CONDEMNATION

MARIO MERCADO E HIJOS, *Petitioner*

v.

SUPERIOR COURT OF PUERTO RICO, EMINENT DOMAIN SECTION, HON. P. SANTOS BORGES, JUDGE, *Respondent*

Petition for Certiorari

To the Hon. Court:

Now comes petitioner Mario Mercado e Hijos through its undersigned attorneys and respectfully states and prays:

1. That on September 4, 1959, the Commonwealth of Puerto Rico, represented by its Hon. Governor, filed in the Superior Court of Puerto Rico, Eminent Domain Section, an action to condemn 70.8397 cuerdas of land belonging to defendant Mario Mercado e Hijos in Barrio Canas, Ponce, Puerto Rico, under No. E-59-823 of said Court.

2. That on May 11, 1961, petitioner herein submitted to plaintiff, the Commonwealth of Puerto Rico, an interrogatory pursuant to the provisions of Rule 30 of the Rules of Civil Procedure of Puerto Rico. In said interrogatory petitioner submits a set of questions in connection with the procedure followed by plaintiff to select and appraise the condemned lands, 70.8397 cuerdas of cane land expropriated from petitioner who is the owner of and operates a sugar mill in the Southern coast of Puerto Rico.

3. Upon being served with the aforesaid interrogatory, plaintiff duly submitted a list of objections to some of the questions and answered others.

We attach hereto and make a part hereof a copy of the Interrogatory submitted to plaintiff as well as the latter's objections and answers thereto.

4. The trial court set a hearing, held on June 20, 1961, to discuss the objections raised by plaintiff to the interrogatory. The issue was submitted to the trial court and the latter, by order dated June 21, 1961, sustained the objections raised by plaintiff on the grounds set forth by the same Court in the orders entered on March 23, 1960, and March 3, 1961, in this same case. We attach hereto a copy of the order of the trial court, dated June 21, 1961.

5. The orders on whose grounds the trial court relied to sustain the objections to the Interrogatory were entered in connection with petitioner's request for permission to take a deposition of plaintiff's expert, to which plaintiff objected alleging that it was not proper in law. Thereupon the trial court denied the request of March 3, 1961. We attach hereto a copy of said order of March 3, 1961.

The remaining order to which the trial court refers in its order which is the object of this petition is the one dated March 23, 1960. That order resulted from a request made by defendant, petitioner herein, to set aside the order for the immediate delivery of the condemned property. In its motion and as grounds for its request, petitioner alleged that the condemnation did not constitute a public purpose as contemplated in the Fifth Amendment to the Federal Constitution petitioner's right to the discovery of evidence pursuant to Rule 30 of the Rules of Civil Procedure of Puerto Rico.

The information requested is not privileged, inasmuch as it does not affect the security of the Commonwealth. Nor are the interrogatories oppressive, onerous, or unfair. (*Sierra, Sec. of Labor* v. *Superior Court*, 81 P.R.R. 540).

The action of the trial court is utterly devoid of a reasonable ground and seriously prejudices the substantial rights

of this party. In condemnation proceedings the burden of proof rests with defendant and the Government's appraiser must not be permitted to sit down and listen to testimonies so that he can later adjust his own testimony to the trial, while this defendant has been denied access to the information in its possession, by virtue of which it was deprived of its property.

We do not think that allowing a situation as that just described is a liberal procedure. Such situation is extremely advantageous for the Commonwealth and its Appraiser as against the rights of defendant to a day in Court. The Commonwealth has all the advantages in this kind of action. The laws recognize its right to enter the property in order to examine it; they permit it to take immediate title and to be given immediate delivery by means of the deposit of a sum unilaterally fixed by its agents. Then, at the trial, all these advantages notwithstanding, it has the most important advantage, to wit, it is the other party who must prove that it is not right.

In the face of this situation we think it is more reasonable and fairer to give defendant the right to the discovery of evidence by means of depositions or interrogatories addressed to the Government's appraiser.

It cannot be held that the information obtained by said appraiser, which provided the basis for the acquisition of the property, is privileged. See *Shell Co.* v. *District Court*, 73 P.R.R. 413; *Tiedman* v. *American Pigment Corporation*, 253 F. 2d 803; *U. S.* v. *Procter & Gamble*, 356 U.S. 677; *Roviaro* v. *U. S.*, 353 U.S. 53; *U. S.* v. *Reynolds*, 345 U.S. 1; *Remedies Against U. S. and its Officials*, 70 Harv. L. Rev. 827, 934-38; *Sierra, Sec. of Labor* v. *Superior Court*, 81 P.R.R. 540.

Said information does not affect the Commonwealth, rather, it affects defendant's property, the object of condemnation. The information requested is highly pertinent

for the preparation of defendant's case (*Shell* v. *District Court,* 73 P.R.R. 413; *Hickman* v. *Taylor,* 329 U.S. 495; 4 Moore's, §§ 26.15 and 33.10-33.22). Plaintiff is caused no harm if obliged to answer. (See *Baker* v. *Procter & Gamble,* 17 FR Serv. 30b.352, case No. 1.)

FOR THE REASONS STATED we respectfully pray this Hon. Court to issue a writ of certiorari to review the action of the trial court in this case, ordering that the record of the case be sent to this Court, and to enter judgment setting aside the order appealed from, and, consequently, to order plaintiff to answer defendant's interrogatory.

Ponce, Puerto Rico, July 7, 1961.

Respectfully prayed,

CHARLES R. CUPRILL and
PEDRO M. PORRATA
Counsel for Petitioner
Box 1224, Ponce, Puerto Rico

By: (s) CHARLES R. CUPRILL
Of Counsel

I, Charles R. Cuprill, state and declare under oath:

That my name is as above set forth, I am of legal age, married, an attorney-at-law, and a resident of Ponce, Puerto Rico. That I am one of petitioner's counsel and as such I prepared the preceding petition and the facts therein alleged are true and known to me of my own and personal knowledge.

Ponce, Puerto Rico, July 7, 1961.

(s) CHARLES R. CUPRILL
Affiant

Aff. No. 251

Subscribed and sworn to before me by Charles R. Cuprill, of the personal circumstances above mentioned, and to me personally known. I attest. Ponce, Puerto Rico, this .. day of July 1961.

(s) PATRICK J. WILSON
Notary Public

(SAME TITLE)

Order

Division composed of Mr. Justice Blanco-Lugo as Chief Judge of Division, Mr. Justice Rigau, and Mr. Justice Dávila.

San Juan, Puerto Rico, July 14, 1961.

The Secretary shall issue a writ of certiorari addressed to the Superior Court, Eminent Domain Section, Hon. Pedro Santos-Borges, Judge, instructing it to send to the Secretary of this Court, as soon as possible, the original record, or a certified copy thereof, of case No. E-59-823, Condemnation, instituted by the Commonwealth of Puerto Rico, etc., plaintiff, v. Mario Mercado e Hijos, defendant, referred to in the petition filed in this case, in order to review the proceedings and to decide in accordance with law. The parties shall comply with Rule 15 of the Rules of this Court.

It was so decreed by the Court as witnesses the signature of the Acting Chief Justice.

(s) LUIS BLANCO-LUGO
Acting Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

Exhibit H

(SAME TITLE)

Division composed of Mr. Justice Blanco-Lugo, as Chief Judge of Division, Mr. Justice Rigau, and Mr. Justice Dávila.

MR. JUSTICE BLANÇO LUGO delivered the opinion of the Court.

At the request of the Puerto Rican Development Company, a condemnation proceeding was instituted on September 9, 1959 against the corporation Mario Mercado e Hijos and others for the purpose of acquiring a parcel of 70.8397 cuerdas of land located in the ward of Canas, Ponce, to be used for industrial purposes. Two days later a decision was issued, ordering the material delivery of the parcel and vesting the Commonwealth of Puerto Rico with title in fee simple over said property.

Respondent requested to set aside the order for actual delivery of the condemned parcel, setting forth in synthesis, the following grounds: 1. the condemnation does not constitute a public use; 2. the exercise of the power to condemn and to deprive an established industry of its source of raw material and then to deliver those lands to private entities for the operation of industrial establishments is unlawful and unconstitutional and, 3. the determination made in the selection of the lands is arbitrary and prejudicial to the interests of the owner, as well as of the community in general. After a hearing during which documentary and oral evidence were introduced, the court by an order of March 23, 1960 dismissed the motion. An appeal was filed which we dismissed on June 6 of that same year. *Commonwealth of Puerto Rico* v. *Mario Mercado e Hijos,* appeal No. 12800. The answer reproduced as special defense that defense relative to the selection of the condemned lands, and in an amended answer it was specifically alleged that

the condemnation was arbitrary, capricious, unreasonable and irrational, therefore depriving it of its property without due process of law.

Respondent served the State a sheet of interrogatories which required the following information:

"1. State the name of the expert or experts employed in the appraisal of the lands involved in this case.

"2. State the name of the persons which took part in the selection of the lands in this case.

"3. State the procedure employed in this case for the selection of the condemned lands and on what basis was their public usefulness determined.

"4. State whether plaintiff was not offered, prior to the condemnation, other lands in the same farm, not planted with cane.

"5. What factors were employed to reach the conclusion that the condemned lands were better?

"6. State how plaintiff arrived at the conclusion that the condemned land is worth $125,455.90 and what elements or factors were utilized.

"7. Furnish copy of the appraisers' report in this case.

"8. Furnish copy of sales or transactions employed to reach that conclusion and state which do you intend to use in this case.

"9. State whether plaintiff took into consideration the impact on Central Rufina and on the sugar industry in general upon condemning 70 cuerdas of land planted with cane.

"10. State whether upon making the selection of the lands, the Department of Agriculture of P. R. was consulted, and if so, what was its answer.

"11. How does plaintiff explain that while on the one hand the Legislature of Puerto Rico spends millions of dollars as incentive for the planting of canes, on the other hand plaintiff strips a farmer of

70 cuerdas of cane, yielding approximately 3,000 tons of cane?

"12. Furnish a list of industrial propositions which plaintiff intends to carry out in the condemned land and the type of activity to which they would be devoted, indicating the number of workers to be employed, annual payroll, and materials to be used.

"13. State whether soil tests were made and in which places. Furnish copy of the report.

"14. Furnish a copy of the report of the Planning Board approving the acquisition of the lands.

"15. Furnish a copy of the requirement referred to in paragraph No. 1 of the complaint.

"16. State whether the condemned lands are adjacent and contiguous to a first-rate highway.

"17. State whether there are facilities of electricity, power, and telephone in that locality.

"18. State the distance between the condemned lands and San Antonio Urbanization, Grillasca Urbanization, from Parque Atlético Montaner, Dr. Pila High School, the Vocational School, Hostos Avenue.

"19. State whether or not the condemned land is flat."

Plaintiff furnished the information as to the name of the expert appraiser employed for the appraisal of the land (interrogatory No. 1), the factors utilized to verify the appraisal (interrogatory No. 6), the report of similar sales considered for the appraisal (interrogatory No. 8) and the topography of the land (interrogatory No. 19). It objected to the rest on the following grounds: as to interrogatories Nos. 2 to 5, because an identical issue—the challenge of the selection of the lands—has already been decided in two previous occasions in a way contrary to the pretensions of the defendant corporation; as to interrogatory No. 7, which required a copy of the report of appraisal, because it was inappropriate; as to interrogatories Nos. 9 to 12,

because they concerned irrelevant matter; and as to the rest, because they concern matter which is easily available to the proponent and within its reach.[1] These objections were sustained, and in order to review the action of the Condemnation Court we granted certiorari.

1. In *Martínez* v. *Superior Court,* 85 P.R.R. 1, we adopted the rule of permitting—under certain conditions—the discovery of expert evidence in cases of condemnation. We specifically authorized that the inspection or copy of the report of the expert appraiser be permitted when, as in the case at bar, the taking of his deposition was not authorized. Respecting interrogatory No. 7 the trial court erred in sustaining that the delivery to defendant of a copy of the report of the appraiser Feliú was inappropriate. However, in the order it shall render, it may impose whatever conditions might safeguard the opportunities which the State should have of adequately preparing itself for the hearing of the case, specially if defendant intends to use later the testimony of experts to challenge the aforesaid report of appraisal.

2. Interrogatories Nos. 2, 3, 4, 5, 9, 10, 11, and 12 are directed towards obtaining information in order to support the allegation that the selection of the land was capricious and arbitrary. Even when this same issue was decided adversely to the defendant corporation—after introducing evidence to that effect—we prefer to discuss it so as to clearly establish the rule which should be observed for the purpose of determining the appropriateness of this allegation and its limitations.

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[1] In the brief filed before this Court, the intervener admits that the trial court committed error in sustaining the objections to interrogatories 16, 17 and 18, because although they dealt with information within the knowledge of the proponent, the object pursued, to obtain admissions, is one of the acknowledged ends in this procedure of discovery of evidence. We concur in this criterion.

In general terms it has been held that since the power to condemn is an attribute inherent to the sovereignty of the State, the only limitations that may be acknowledged to its exercise are that the property be devoted to public use or purpose and that defendant be paid a just compensation therefor. Any doubt that might lurk as a consequence of the language used in the opinion of *United States* v. *Carmack,* 329 U.S. 230, 247 (1946), seems to vanish after *Berman* v. *Parker,* 348 U.S. 26, 36 (1954), in which it was recognized that an urban development agency had power to acquire not only the dilapidated buildings, but also the entire area in which they are located for the purposes of a project to eliminate slums. It was stated that "It is not for the courts . . . to sort and choose among the various parcels selected for condemnation," and it was added that "The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking."[2] In fact, it has been held that once it has been established that the use for which the condemned property is destined constitutes a public purpose, it is not for the courts to review determinations on the nature or scope of the right to be acquired, the amount of land to be condemned, the necessity or the adequacy of the place in particular, because this power resides in the legislature and may either be exercised by the legislature or delegated by it to public officers or agencies. *Rindge Co.* v. *Los Angeles County,* 262 U.S. 700, 709 (1923); *Joslin Mfg. Co.* v. *City of Providence,* 262 U.S. 668 (1923); *Bragg* v. *Weaver,* 251 U.S. 57, 58 (1919); *Shoemaker* v. *United States,* 147 U.S. 282, 298 (1893); *Boom Co.* v. *Patterson,* 98 U.S. 400, 406 (1878); *United States* v. *South Dakota,* 212 F. 2d 14 (C.A. 8, 1954); *Simmonds* v. *United States,* 199 F. 2d 305, 306-07 (C.A. 9,

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[2] For a detailed analysis of this opinion see footnote 50 of the opinion delivered in *Commonwealth* v. *Aguavo,* 80 P.R.R. 534, 583 (1958).

1952); *United States* v. *State of New York,* 160 F. 2d 479, 480 (C.C.A. 2, 1947), *cert. denied,* 331 U.S. 832 (1947); *United States* v. *Meyer,* 113 F. 2d 387 (C.C.A. 7, 1940), *cert. denied,* 311 U.S. 706 (1940). See also, 48 Cal. L. Rev. 164 (1960); 12 Okla. L. Rev. 163 (1959); 43 Iowa L. Rev. 290 (1958); 17 N. Dame Law. 35 (1941); 24 Minn. L. Rev. 870 (1940). In some places it is acknowledged that the selection of the property to be condemned may be challenged when such selection is manifestly arbitrary, capricious or unreasonable or when fraud or bad faith are shown, *Johnson et al.* v. *Consolidated Gas, Elec. Light and Power Co.,* 50 A. 2d 918, 923 (Md. 1947); *Patterson Orchard Co.* v. *Southwest Arkansas Corp.,* 18 S.W. 2d 1028, 1032 (Ark. 1929); *State* v. *McCook,* 147 Atl. 126, 128 (Conn. 1929); *Wilton* v. *St. Johns County,* 123 So. 527, 535 (Fla. 1929); *City of Charlotte* v. *Heath,* 40 S.E. 2d 600, 603 (N.C. 1946), but a careful analysis will reveal that this doctrine derives its basis mainly from cases in which the state has delegated its power to condemn to private entities which are dedicated to public or quasi-public purposes, such as railroad, power and electricity or public service companies. Such is not the case at bar, since it concerns a condemnation undertaken by a public agency for obvious public purposes, that is, for industrial development. Admitting that the purpose is public, *Commonwealth* v. *Fajardo Sugar Co.,* 79 P.R.R. 303 (1956); *McCormick* v. *Marrero, Judge,* 64 P.R.R. 250 (1944); *People* v. *Eastern Sugar Associates,* 156 F. 2d 316 (C.C.A. 1, 1946), *cert. denied* in 329 U.S. 772 (C.C.A. 1, 1946), it is not up to us to review the exercise of administrative discretion in the selection of the condemned lands or their adaptability for the specific public use to which they are destined. In *Southern Ry. Co.* v. *City of Memphis,* 148 S.W. 662 (Tenn. 1912), it is stated "But all other incidents of the taking [with the exception of the purpose of the condemnation and the fixing of the just compensation] are political questions, for the determination of the sovereign, and not judicial questions, for the determination

of the courts. Selecting the property to be taken, as contradistinguished from similar property in the same locality, determining its suitableness for the use to which it is proposed to put it, as well as deciding the quantity required, are all political questions, which inhere in and constitute the chief value of the power to take. This power would be a vain and empty thing, if the owner could contest the advisability of taking his property rather than his neighbor's, or if he could interpose as a defense of the taking that other property could be found which would suit the public purposes better or that he, the owner, was of opinion and could prove that the public needed more or less than the quantity proposed to be taken."

But be it as it may, petitioner in this appeal is estopped at this stage of the proceedings from raising the defense we have discussed, since an examination of the record reveals that the withdrawal of the amount deposited by the State as just compensation was sought and the corresponding check for the sum of $121,827.40 was actually drawn in favor of the corporation. This being so, the acceptance by respondent of the amount deposited precludes him from arguing any other issue which does not relate exclusively to the amount of the compensation. *Williams* v. *City of La Grange,* 98 S.E. 2d 617 (Ga. 1957); *State* v. *Highway Dept.* v. *H. G. Hastings Co.,* 199 S.E. 793 (Ga. 1938); *Central of Georgia Ry. Co.* v. *Bibb Brick Co.,* 99 S.E. 126 (Ga. 1919). A party may not voluntarily accept the deposited amount as just and reasonable value of its property and continue litigating the right of the State to condemn.

3. Interrogatory No. 13 requires information on the testing of the soil and copy of the reports which we assume refer to the subsoil's quality. Such a request is not inappropriate, *Martínez* v. *Superior Court, supra.*

The decision rendered by the Superior Court, Condemnation Part, on June 21, 1961 shall be modified in the sense

of dismissing the objections presented to interrogatories Nos. 7, 13, 16, 17, and 18, and plaintiff shall be ordered to answer them within the term and under the reasonable conditions fixed by the trial court. As thus modified, it is affirmed.

Exhibit I

(SAME TITLE)

Judgment

Division composed of Mr. Justice Blanco-Lugo as Chief Judge of Division, Mr. Justice Rigau, and Mr. Justice Dávila.

San Juan, Puerto Rico, May 4, 1962

For the reasons stated in the opinion delivered on this date, the order issued on June 21, 1961 by the Superior Court, Eminent Domain Section, is hereby modified in the sense of dismissing the objections raised to interrogatories Nos. 7, 13, 16, 17, and 18, and as thus modified it is hereby affirmed.

It was so ordered and decreed by the Court as witnesses the signature of the Chief Justice.

(s) LUIS NEGRÓN FERNÁNDEZ
Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

Exhibit J

(Filed May 14, 1962)

(SAME TITLE)

Motion for Reconsideration

To the Hon. Court:

Now comes petitioner through its undersigned counsel and moves for reconsideration of the judgment rendered on May 4, 1962, insofar as the denial of interrogatories Nos. 2, 3, 4, 5, 9, 10, 11, and 12 is concerned.

Our motion is based on the facts clearly established in the record of this case, tending to show that when petitioner challenged the selection of the lands in the trial court, it did so on the basis of the oral and documentary evidence introduced, which undoubtedly proved its allegation, whereas plaintiff, to wit, the Commonwealth, introduced no evidence and merely relied on the pleadings.

We understand that in accordance with the decisions in *United States* v. *Carmack*, 329 U.S. 230, 67 S. Ct. 252, L. ed. 209, and *United States* v. *Willis*, 211 F.2d 1, if it is shown that the government or agency in charge has acted in an arbitrary manner, as happened in this case, the Court has jurisdiction to interfere in connection with such determination. The doctrine established is in the sense that when the designated officials act in bad faith or so capriciously and arbitrarily that their action is without adequate determining principle, the selection made may be set aside by the Court entertaining the proceeding. In *Berman* v. *Parker*, 348 U.S. 26, involving the exercise of the police power to protect the health of citizens, the interpretation had undoubtedly to be more favorable to the State, but in the case with which we are concerned it cannot be said that it is precisely the police power that is

involved, rather, it is a government program approved by the Legislature of Puerto Rico authorizing an agency to condemn lands with the purpose of carrying out the program. And that program, as we have proved here, is in conflict with the development of agriculture in Puerto Rico. Petitioner also moves for reconsideration of the portion of the judgment holding that petitioner is barred from raising the afore-mentioned defense because it asked for the withdrawal of the sum deposited by the Commonwealth as just compensation, and that once it accepted the amount deposited it is estopped from arguing any other question not exclusively related to the amount of the indemnity. The Court overlooks the fact that in the motion to withdraw funds it was expressly stated that withdrawal was without prejudice to the allegations made in the case. If the Commonwealth surrendered the funds despite the manner in which the motion for withdrawal is worded, the Commonwealth, not the party who requested it under those conditions, is the waiving party.

We also move for reconsideration of the portion of the judgment in which the Court states that it is not proper for the Court to interfere once it is established that the use to which the property is intended is a public purpose.

In *United States* v. *Certain Real Estate, etc.*, 217 F.2d 920, it is established that courts have power to determine whether the use for which the private property is to be taken, under legislative authorization, is in fact a public use. We think that the fact that the agency or the Legislature should have determined that the purpose to which the condemned parcel is to be dedicated is a public use does not divest the Court of authority to determine whether or not it is in fact. This is a judicial, not a legislative, function.

WHEREFORE, we move for reconsideration of the judgment insofar as the negative to answer the above-mentioned interrogatories is concerned.

Ponce, Puerto Rico, May 11, 1962.

Respectfully,

PEDRO M. PORRATA
CHARLES R. CUPRILL

By: (s) CHARLES R. CUPRILL

I CERTIFY: That on this same date I mailed, post paid, a copy of this motion for reconsideration to the Hon. Secretary of Justice of Puerto Rico, counsel for respondent in this case, to his address in San Juan, Puerto Rico.

Ponce, Puerto Rico, May 11, 1962.

(s) CHARLES R. CUPRILL

Exhibit K

(SAME TITLE)

Order

Division composed of Mr. Justice Blanco-Lugo as Chief Judge of Division, Mr. Justice Rigau, and Mr. Justice Dávila.

San Juan, Puerto Rico, May 28, 1962

The foregoing motion for reconsideration is hereby denied.

It was so ordered by the Court as witnesses the signature of the Acting Chief Justice.

(s) PEDRO PÉREZ PIMENTEL
Acting Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

Exhibit L

IN THE SUPERIOR COURT OF PUERTO RICO
EMINENT DOMAIN SECTION

Case No. E59-823
to
E59-825

CONDEMNATION

THE COMMONWEALTH OF PUERTO RICO, represented by its Governor, *Plaintiff*

v.

70.8397 CUERDAS OF LAND located in Bo. Canas, Ponce and MARIO MERCADO E HIJOS, ET AL., *Defendants*

Findings of Fact, Conclusions of Law and Judgment

At the request of the Puerto Rico Industrial Development Company, on September 9, 1959, the Commonwealth of Puerto Rico filed a complaint for condemnation against Sociedad Mario Mercado e Hijos, seeking acquisition of the property hereinafter described, and deposited the sum of $121,827.40 as the estimated compensation to be paid therefor.

On September 30 of that same year defendant moved to set aside our order of acquisition and material delivery of the property to plaintiff.

We set November 9 to hear the parties in connection with the merits of the motion, but at defendant's request we continued the hearing for the 23rd of that same month. In the order of continuance we decreed that, if after hearing the case on its merits, we should grant defendant an additional sum as compensation, such additional sum would not accrue interest from the date the continuance was prayed for until the date trial should begin.

We held the hearing on the date set, evidence was introduced; we gave the parties time to file briefs and on

March 23, 1960, we entered an order dismissing the motion, giving defendant 10 days to answer the complaint, which, following an extension of time granted, was answered on April 16 of that same year.

On April 8 defendant appealed to the Hon. Supreme Court from our order and this appeal was dismissed on plaintiff-appellee's motion on June 6, 1960.

After the filing of other motions regarding several incidents, extending periods of time, filing of briefs, defendant requested the withdrawal of the funds deposited and subsequent to a hearing held on March 17, 1961, we ordered the delivery of said sum.

We set May 8, 1961 for the trial, and gave notice to the parties on March 24. On the 30th of this month defendant filed an amended answer and on May 4 it moved for a continuance which was granted by us.

On May 11 plaintiff was served by defendant with an interrogatory and it was objected to in part and answered in part on June 14. On June 21 we held a hearing and after hearing the parties on the objections raised, we sustained the objections, save for Nos. 7, 13, 16, 17 and 18 and we ordered these answered. It was not until June 20, 1962, that these questions were answered.

On October 11 of this year we again set December 10 to hold the trial but on account of the illness of defendant's counsel, Mr. Charles R. Cuprill, we approved a stipulation of the parties agreeing to a continuance and again we set January 31, 1963, to hear the case. On the latter date the trial was finally begun, extending throughout February 1, 26, 27 and 28; March 1, May 13, 14, 15 and 16.

After weighing the evidence introduced, both expert and documentary, and taking into consideration our personal experience during the inspection, these are our:

FINDINGS OF FACT

Main Property

(1) The main property from which the three condemned parcels hereinafter described are segregated, known as Hacienda Matilde, recorded at page 41, over, of volume 74, of Ponce, Puerto Rico, 29th entry, number 1, has an area of approximately 4,000 cuerdas of which, 514 cuerdas have for the past one hundred years been dedicated to the cultivation of sugar cane and the rest to natural pasture. It is located in Bo. Canas in the municipality of Ponce and faces for along a considerable distance Commonwealth Highway No. 2 leading from Ponce to Guayanilla. (See Defendant's Exhibit a, b and c introduced at the session of November 23, 1959).

Condemned Parcels

Description:

(2) The parcels acquired by means of this Eminent Domain Proceeding are described as follows:

(a) Parcel No. 1—has an area of 26.8857 cuerdas and is adjacent on the North, along 374.04 linear meters, to the former servitude of Compañía de los Ferrocarriles de Puerto Rico which, at the time of the condemnation, belonged to Puerto Rico Railroad Land and Development Company; on the South, along 339.99 meters, to Commonwealth Highway No. 2 leading from Ponce to Guayanilla; on the East, along 353.37 meters, to lands of the main property; and on the West along 259.40 meters, to Insuldyne Corporation.

It is almost rectangular in shape. (Defendant's Exhibit 1.). It is separated from No. 2 by a parcel of 9.58 cuerdas belonging to Insuldyne Corporation, and from No. 4, by a strip of land belonging to P. R. Railroad Land and Development Corporation.

Its topography is slanted from South to North, its minimum elevation being towards the South East and the

maximum, towards the North. Between the highest point—is 11 meters above sea level—and the lowest point—6 meters below sea level—there is a difference of six meters in altitude.

It is crossed from East to West by two lateral irrigation canals which, in addition to irrigating it as well as part of parcel No. 2, irrigated approximately 125 cuerdas located on its East side. Two vertical irrigation canals crossed it from North to South.

(b) Parcel No. 2—is triangular in shape and was practically subdivided, since it was separated from parcel No. 1 by lands of the Insuldyne Corp. on its East side, from No. 4, by the strip of the railroad, and faced Highway No. 2 on its South side along 300 linear meters. The apex of the triangle lay on the West side.

It has an area of 7.7566 cuerdas and its topography is slanted from South to North, with a minimum elevation on the South East section of 9 meters above sea level and the maximum of 12 meters along its boundary with the strip of the railroad, on the North.

Four irrigation canals crossed it from North to South. Another from North East to South East, passing at a distance of 6 meters from and parallel to the servitude of the railroad. In addition to an artificial lake located on parcel No. 4, hereinafter described in detail, there are two canals running towards the South below the strip of the railroad, entering parcel No. 2 through the portion located at the North East corner of the triangle, later turning towards the East, entering the parcel of Insuldyne Corp., and going on to irrigate parcel No. 1 and 125 cuerdas situated East of the latter, which form part of the main property.

(c) Parcel No. 4—has an area of 33.6930 cuerdas and is irregularly shaped. It is separated from parcels Nos. 1 and 2 by the strip of the railroad. Except for its South and South East boundaries, which are straight, the re-

maining are irregular. On its North side it is adjacent to a brook known as "Quebrada del Agua" and to lands of defendant's main property along 414.77 linear meters; on the South, along 154.24 meters, to Commonwealth Highway No. 2; on the East, which is really the South East, along 861.39 meters, to the strip of land of P. R. Railroad Land & Development Co.; and on the West, which must be called North West, along 712.17 meters, to lands of the Commonwealth, assigned to the Administration of Social Programs, where Rural Canas Development is located.

With a slanting topography from South to North, it has on the North West a maximum elevation of 16 meters above sea level and a minimum elevation of the South East, where it bounds on the "Quebrada del Agua" of 10 meters above sea level.

It is on this parcel that the artificial lake utilized to supply the various areas subject to irrigation, composed by the three condemned parcels and the 125 cuerdas above mentioned, located to the East of Nos. 1 and 4, is located. It occupies an area of 3.70 cuerdas, equivalent to 14,600 square meters and occupies a volume of 39,000 cubic meters. The soil and subsoil of the three parcels is firm, compact and consistent.

ZONING

(3) None of the three parcels acquired lay within the urban zone of the city of Ponce nor had they been zoned by the Puerto Rico Planning Board. The point in the zoned area in Ponce closest to the condemned parcels is at a distance of one and a half kilometers.

PUBLIC SERVICES

(4) Along Highway No. 2 there are accessible electric energy lines to bring this service to the three condemned parcels. Telephone lines pass through the strip of land belonging to the P. R. Railroad Land & Development Com-

pany. These parcels lacked either pluvial or sanitary sewer system and aqueduct service.

In April 1960, 6,170 motor vehicles, public and private, moved daily along Commonwealth Highway No. 2.

VICINITY

(5) On September 11, 1959, that is, when title to the condemned parcels vested in the Commonwealth, the only existing developments in its immediate vicinity were the following:

(a) On its West side and adjacent to parcel No. 4, the Social Programs Bureau of the Department of Agriculture had established a rural community, known as "Comunidad Canas" on a one hundred-cuerda farm that had been subdivided into 205 parcels and where approximately 1,000 persons of low income live in small frame houses lacking pluvial or sanitary sewer, paved streets, for the latter are dirt roads, and having no sidewalks or curbs. They only have electric light facilities, because they obtain water from faucets jointly used by all the inhabitants.

(b) Between parcels 1 and 2 there is an industrial building, the only one in the immediate vicinity of the three parcels. It is located on a parcel of approximately nine cuerdas belonging to Insuldyne Corporation. It is only at a distance of 1,600 linear meters, in the intersection of the Ponce By Pass and former Highway No. 2, which is included within the urban area zoned by the Planning Board, that we find an industrial area.

(c) At a distance of 250 linear meters, on the East side of parcel No. 1, runs the "Quebrada del Agua," crossing below Highway No. 2, at a place where there is a depression. During heavy rains and twice or three times a year, the water in the brook rises and floods the highway, interrupting traffic for two or three hours.

(d) Perla del Sur and San Antonio Developments are the closest residential areas to the three parcels and are at a distance of approximately two kilometers and seven hectometers.

UNDEVELOPED URBAN LANDS

(6) Within the urban limits of the city of Ponce, zoned for residential and industrial purposes, there are 4.900 cuerdas of land that at the time of the condemnation had not been developed, and most of them are still undeveloped to date. Of this number of cuerdas, 1,000 have been classified as R-3 and 3,900 as R-1. Approximately 1,500 cuerdas are more advantageously located than the three condemned parcels.

For heavy industrial development purposes approximately 250 cuerdas have been zoned; and for light industry, approximately 450 cuerdas.

LOCATION

(7) The property with which we are concerned is located between the city of Ponce and the town of Guayanilla, within the rural zone of the former. We list below the distances from the points indicated:

From the intersection of the Ponce By Pass and Highway No. 2	1,600 meters
From the intersection of Los Pámpanos Highway and the Ponce By Pass	2,000 meters
From Santa María Catholic University	3,000 meters
From Perla del Sur Development	2,400 meters
From San Antonio Development	2,700 meters
From Hostos Avenue	3,600 meters
From Villa Grillasca Development	2,700 meters
From Interior Avenue at the point nearest to Highway No. 2	2,700 meters
From the Plaza de Recreo of Ponce located North East of the parcels	4,600 meters

From Dr. Pila High School, North of Interior Avenue ..... 2,800 meters
From the Ponce Commercial Center, located near the Plaza de Recreo and Atocha Street ..... 4,800 meters
From the port area ..... 6,000 meters
From the Ponce Shopping Center ..... 3,800 meters

All the points mentioned are located within the urban area or limits of the city of Ponce.

TRAFFIC

(8) According to a research made in 1960 by the Puerto Rico Department of Public Works, in cooperation with the Federal Department of Public Works, as shown in a plan drawn up by these agencies (Plaintiff's Exhibit No. 4), the heaviest motor-vehicle traffic was in front of the Plaza de Recreo of Ponce with 13,090 units daily, and in order of intensity, it is followed by: Hostos Avenue, near Interior Avenue, 11,980 vehicles; highway leading from Ponce to Juana Díaz, in front of La Rambla Development, 11,280 vehicles; Villa Street, close to its intersection with former Highway No. 2, 10,100 vehicle; this same road, in front of San Antonio Development, 800 vehicles; Commonwealth Highway No. 1, in its intersection with the Ponce By Pass, 7,790 vehicles; and in front of the condemned parcels, Highway No. 2, from Ponce to Guayanilla, 6,170 vehicles.

PROXIMITY OF AQUEDUCT AND SEWER SERVICES

(9) From the main pipe of the size considered as most adequate to install a pipe 8 inches in diameter, needed to bring water service to the condemned parcels, there is a distance of 2,300 linear meters. The distance between the sanitary sewer main pipe, 30 inches in diameter, from the crossing of Pámpanos and Guayanilla Highway, up to parcel No. 4, which is the farthest, is 2,300 linear meters.

BEST USE

(10) Taking into consideration its location, its vicinity, the fact that it is part of a property located in the Ponce rural area, that it had not been zoned, its lack of water and sewer services; taking also into account that within the urban zone of the city and zoned by the Planning Board for residential and industrial purposes, there were approximately 4,900 undeveloped cuerdas of land, we conclude that the best use of the condemned property at the time title thereto vested in the Commonwealth, to wit, September 9, 1959, was agricultural, but with an increased value for these purposes in view of the possibility that within a reasonable period of time it could be dedicated to industrial or residential development purposes. Although it is quite hard to estimate how long it would take for this potentiality to become a reality, we dare conclude that, due to the dynamic rhythm of the growth of the economy from a commercial and industrial point of view, in Ponce and its surroundings, a five-year period might be considered as reasonable.[1]

COST OF URBAN DEVELOPMENT OF CONDEMNED PARCELS

(11) The determination of the best use of the condemned land, as indicated in the preceding paragraph, not only compels us to analyze the sales of lands contemporaneous with the date of their taking, but also obliges us to examine its development for urban purposes in the event its owner or any voluntary purchaser had risked urbanizing it in September 1959.

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[1] From September 9, 1959, on which date the three parcels were taken, until the day we made the inspection, towards the end of May 1963, close to four years have gone by. We notice that of the 68 cuerdas taken, there still remained a large undeveloped tract of land. Likewise, adjacent lands, on the East side of the parcels and to the West of Canas Community, along Highway No. 2, were still being dedicated to agricultural purposes.

In the first place, it was indispensable to bring aqueduct and sewer facilities to the three parcels. Extending the pipes 8″ in diameter for 2,300 linear meters, in order to bring water service to 400 lots, which would have resulted for dwelling purposes in the 68 cuerdas, would have cost $60,000.00. Bringing pipes for sanitary sewer service, together with pumps, etc., would have cost $165,000.00. Over and above the value of the land, in the condition it was at the time it was taken, these two investments would have increased the cost per cuerda by $950.00 and $2,400.00, respectively. The Public Works Department required, in order that the parcels could be developed, the widening of the right of way of Highway No. 2 by 2.54 meters wide and 815 meters long. Cutting the ground, filling, and paving the required strip cost $6,904.00, increasing the cost by $100.00 per cuerda, more or less.

It would have been necessary to relocate the various irrigation canals in order to continue this service with regard to the 125 cuerdas above mentioned. The cost of this relocation[2] would have reached $26,483.00. This expenditure is equivalent to an additional cost of $385.00 per cuerda.

Filling, tamping, and suiting the area occupied by the lake so that it could be integrated to any proposed urban development, and relocating it somewhere else on the main property, would have cost approximately $29,675.00.[3] This

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[2] The Industrial Development Company relocated the aforesaid canals investing the amount indicated. Hence, the 125-cuerda parcel to which we have referred has suffered no harm in this concept as a result of the condemnation.

[3] Notice that the actual cost of relocating the lake amounted to $4,675.00, as stipulated by the parties when the trial was nearing its end. The principal investment would have been the filling of the existing lake. In addition to the soil on its banks that could be removed for this purpose, an additional filling of approximately 50,000 cubic meters was required, and it had to be loaded and transported from another place at a cost of 50¢ per cubic meter.

increases the cost of the land by approximately $435.00 per cuerda.

This condition could not have escaped any capable and informed potential urbanizer. He would have had to consider that to the price per cuerda paid by him he would have to add the sum of $4,270.00.

Notice that this investment does not include the complete construction of the project, inasmuch as it is later that the land is begun to be replanted, streets traced and constructed, including sidewalks, curb, and paving; water, light and sewer connected to each lot, in addition to the financing expenses and reasonable profit of the urbanizer for the construction of the work.

SALES

(12) In order to be able to determine the additional value of the parcels over and above their agricultural value on the date of their acquisition, due to the fact that in a reasonably future period its best use might be for urban development, thus obtaining a better financial use thereof, we must examine sales of other lands located in the area of the city of Ponce. We shall make adjustments insofar as pertinent, and in the comparison process we shall determine the differences and similarities existing between those and the condemned parcels. Let us see:

a. (Defendant's Exhibit No. 6.) On March 8, 1958, José and Francisco Salich sold to Puerto Rico Metallic Works a parcel of land of 3.89 cuerdas at the rate of $4,062.00 per cuerda. On September 17 of the same year the Planning Board approved a resolution (Plaintiff's Exhibit No. 7) by virtue of which it declared that the best use thereof was industrial. As a matter of fact, that was its best use at the time of the sale, for it was practically adjacent to other industries, such as Ponce Candy Corporation and Buena Vista Dairy.

These are its boundaries:
North: Vallas Road and a Sanctuary,
South and West: Bucaná River,
East: Old Road leading to La Playa.

It is very near to Commonwealth Highway No. 1 where the latter intersects the Ponce By Pass. It is at a distance of 320 linear meters from Mercedita Development; 600 meters from Buena Vista; 300 meters from Constancia; 2,300 meters from the Plaza de Recreo of Ponce, and approximately 7 kilometers from the condemned parcels.

The main pipe to which the sanitary sewer pipes could be connected was at a distance of 350 linear meters; and it had light and electric energy, aqueduct water, and telephone services.

Because it was in fact a subdivided parcel, because it was practically integrated into an industrial and residential area, because of its proximity to the city of Ponce, because it had light and electric energy, water, telephone services, and because the sewer system was readily accessible, because of its smaller size, and because it did not require any extraordinary expenses to be developed, this parcel of land exceeded the condemned parcels by far as to value.

b. (Defendant's Exhibit No. 11.) The parcel we are about to examine belonged to Tomás and María Inmaculada Bota, and by Deed No. 22, executed before Notary Public Lorenzo Lagarde Garcés, on September 26, 1957, the former sold his share of 20.15657 cuerdas to Puerto Rico Road Contractors at the rate of $4,834.83. His sister, María Inmaculada, sold her share of 76.42173 cuerdas on the same date, by Deed No. 77, executed in Ponce, Puerto Rico, before Notary Public Rafael Hernández Matos, to the same corporation at the same price per cuerda.

It is adjacent on the North to Villa Street—one of the most important arteries in Ponce—to Roosevelt Street, Camino de los Tendales, Miguel Martinó, lands of the Ponce

Municipal Housing Authority, Commonwealth Highway leading from Ponce to Guayanilla, lands of Dr. Pila High School, and lands of Ponce Cement Corporation; on the South, to lands of Ponce Cement Corporation, Los Pámpanos dirt road, lands of Paquito Montaner Athletic Park, and, again, Ponce Cement Corporation; and on the West, to Ponce Cement Corporation, Carlos M. Santiago, Los Pámpanos dirt road, and lands of Miguel Martinó.

We notice that this property was within the urban limits of the city of Ponce and had been zoned to be developed for residential purposes. In addition to begin adjacent to the aforesaid streets, on the date of the sale it had already been planned to construct Interior Avenue of Ponce, 33.60 linear meters wide, which, starting on Hostos Avenue runs towards the West, crosses in front of Santa María Catholic University, passes in front of Villa Grillasca, goes on to intersect highway No. 2 and to cross San Antonio Development. In the future said avenue will reach highway No. 132 leading from Ponce to Peñuelas. This avenue occupies a strip 700 linear meters long and 33.60 wide belonging to the Bota Canet parcel the object of this analysis.

The parcel had water, light, electric energy, and telephone service, and the sanitary sewer pipes could be connected through a strip of land 10 meters wide and 151.81 meters long located between the lands of Dr. Pila High School and the lands of Baldorioty Development and leading to highway No. 2 on which one of the main pipes of the sewer system of Ponce, 30 inches in diameter, is located.

In our judgment, and we so hold, the parcel involved in this sale was far better than the condemned parcels because it is within the urban zone of Ponce, was already zoned for residential development; because it had water, light, and telephone service, needing a small expense in connection with the sanitary sewer; because of its vicinity and location; because it was crossed by a first-rate public highway, etc., etc.

c. (Defendant's Exhibit No. 7.) On February 14, 1958, Sucesión Rosaly sold to Ponce Builders Corp. a parcel of land having an area of 51.72 cuerdas at the rate of $5,020.00 per cuerda. Located Northwest of the city and zoned as R-3, it is within the Ponce urban area. It is an extension of La Rambla Development, of which seven streets ended on the parcel involved in this sale. It had water, light, sewer, and telephone, and these services were extended when this parcel was developed and integrated into the original La Rambla Development.

As previously noted, in front of La Rambla there is a daily traffic of 10,040 vehicles. A commercial area of a local nature extending for approximately 400 linear meters is established there.

Because of its location, vicinity, urban nature, and zoning; because of the public facilities and services it has; because it is near a local commercial area established right in its front; because the cost of developing it is less and because it lacks the physical liens affecting the condemned properties, the value of this parcel is greater by far than the value of the parcels acquired by means of this proceeding.

d. (Defendant's Exhibit No. 8.) On June 26, 1958, Reparada Development Corporation sold to Cooperative de Hogares Perla del Sur a parcel having an area of 21.636 cuerdas, at the rate of $8,000.00 per cuerda. It is adjacent on the North, along 123 linear meters, to lands of the seller Reparada Development Corporation; on the South, to Ponce Exterior Avenue, also known as Ponce By Pass, along 123 meters; on the East, to Villa Grillasca Development along 683.41 meters; and on the West, along 677.74 meters, to more lands of the seller. Three streets of Villa Grillasca Development ended at this parcel, and said streets carried light and electric energy lines, aqueduct and sewer pipes, and telephone lines, which services could easily be extended if the parcel were developed.

It is only 140 linear meters away from Ponce Interior Avenue, but through other streets it had access to said avenue which in turn meets Exterior Avenue through Capitán Correa Street. It is located 400 meters away from Santa María Catholic University, 150 meters from Santa María Development, 150 meters from Mariani and Mariani Extension Developments; 600 meters from the Ponce Shipping Center, Dr. Pila School, and Vocational School; 700 meters from the ball park.

The condemned parcels are at a distance of 3,000 linear meters from the parcel now being described.

Because of the condition of the aforesaid parcel when the sale took place; because it was integrated into an area intensively developed; because of its enviable vicinity; because it had every public service; because it lay within the urban zone and had been zoned as R-3, in short, because of its excellent and wonderful location, this parcel was an extremely better value than the condemned parcels.

e. (Defendant's Exhibit No. 9.) Natalio Encarnación sold to Luis Colón Alustize on October 27, 1959, a farm of 6.85 cuerdas at the rate of $1,700.00 per cuerda. It is adjacent, on the North and East, to highway No. 132 leading from Ponce to Peñuelas, and on the South and West to Marrueños River. It is level and is flooded during heavy rains.

The parcel was not zoned at the time of the sale which, we note in passing, is contemporaneous with the date on which the condemned parcels were acquired. It is three kilometers away from the Ponce zoned area. The only service it had was electricity.

In value it was somewhat lower than the condemned parcels.

f. (Defendant's Exhibit No. 10.) The parcel involved in this sale constitutes an extension of the urbanization developed on the parcel previously described in subdivision

"d", Defendant's Exhibit 8, also known as Perla del Sur Development. It was sold by Reparada Development Corporation to Cooperative Perla del Sur in August 1960, also at the rate of $8,000.00. It is modified by the same factors as the parcel precedingly described, for which reason we need not repeat now.

g. (Defendant's Exhibit No. 12.) On May 26, 1959, Reparada Development Corporation sold to Southern Realty Corporation a parcel of land of 20 cuerdas at the rate of $9,500.00 per cuerda. Facing Exterior Avenue along 307.798 linear meters, it is located in front of Villa Grillasca Development, close to Catholic University, was zoned as R-3 and had all the public services and facilities described under subdivisions "e" and "f". Therefore, its value is greater than the value of the condemned parcels.

h. (Plaintiff's Exhibit No. 12.) On October 19, 1957, Mrs. María Monserrate Canals Arriba sold to Félix Juan Serrallés Sánchez and others a parcel of land having an area of 60.55 cuerdas for the sum of $215,000.00, that is, at the rate of $3,550.67 per cuerda. It is adjacent, on the North, to Bucaná River; on the South, along 400 linear meters, to Exterior Avenue or Ponce By Pass; on the East, to Tenerías dirt road, which separates it from lands of Allah, Marino Torres, and Juan Bota Flores, and to lands of Sucesión Juan Torruella Cortada; and on the West, to lands of Emilio Fagot. (See Exhibit "A" of both parties.)

The parcel is located north of the city, in front of Buena Vista Development and is adjacent to La Alhambra Development, one of the most exclusive developments in Ponce. It is also near Mercedita Development and is 500 linear meters away from the intersection of Commonwealth Highway No. 1 and Ponce By Pass.

It is level all throughout. The sanitary sewer system ran along its front and it had every other public service and facility. Unlike the condemned parcels it had no filling problem, it was within the urban zone, and its best use was

being developed for urban purposes. For all these reasons it was better than the parcels in question and had a greater value than the latter.

STIPULATION

(13) Near the end of the trial the parties presented a stipulation, that was approved by us, in the sense that if after weighing the evidence we should reach the conclusion that the best use of the parcel, on the date of its acquisition, was agricultural, which value increased by the potentialities of being urbanized in a reasonably near future, plaintiff would be bound to pay the cost of relocating the lake located on parcel No. 4.

The aforesaid relocation was carried out by defendant at a cost of $4,675.00.

CONCLUSIONS OF LAW

1. The Superior Court of Puerto Rico, Eminent Domain Section, has jurisdiction over the parties and over the subject-matter in question.

2. The Commonwealth of Puerto Rico is authorized by law to acquire this property by eminent domain for public use and the purpose for which it was acquired is a public use.

3. By order of March 23, 1960, we dismissed the allegations, objections, and pleadings raised by defendant against the complaint. Defendant reproduced the same pleadings and objections as special defenses in the answer it filed on April 16 of that same year. We ratified our order, not only on the same grounds advanced at that time but also because defendant, in withdrawing the funds that had been deposited in court and which represented the amount of the appraisal of the condemned property, waived those objections and pleadings, thereby leaving for decision merely the controversy in connection with the valuation.

4. Inasmuch as the only question in issue is the amount that plaintiff is bound to pay to the other party for the property, defendant came to occupy the position of plaintiff and as such it had the burden to prove by means of authentic and convincing evidence that it was entitled to collect an amount greater than the one deposited by plaintiff as the value of the property. This issue was thus decided in *People* v. *García,* 66 P.R.R. 478, in which it was also held as follows:

> ". . . The rationale of this rule is that, as to the amount which petitioner has deposited as just compensation, there is no controversy, and the only question is whether the compensation is more than the amount deposited. Therefore, the issue consists of the owner's contention to the effect that the compensation should be greater than the amount deposited and the denial of this assertion by the petitioner. . . ." (66 P.R.R. 478, 481 to 482.)

Defendant's evidence has not convinced us that it is entitled to an amount larger than the sum deposited. Had we held any doubt as to this conclusion, which is not the case, such doubt would have been dispelled when we considered and compared the lands involved herein and those sold by Mrs. María Monserrate Canals Arriba to Félix Juan Serrallés and others as well as the price paid therefor. (See our Finding of Fact No. 13, subdivision H.)

In consideration of the foregoing findings of fact and conclusions of law, the complaint is hereby granted and judgment is entered with the following pronouncements:

JUDGMENT

1. We hereby declare and decree that title to the condemned property in fee simple absolute vests in the Commonwealth of Puerto Rico for the use and benefit of the Industrial Development Company of Puerto Rico.

2. Defendant's argument in the sense that the value of the condemned property at the time of its acquisition amounted to $409,250.00 and not to $121,827.40, which was the sum deposited in the office of the Clerk of this Court, is hereby dismissed.

3. Plaintiff is ordered to deposit in this Court the sum of $4,675.00, representing defendant's investment in the relocation of the lake located on Parcel No. 4. This sum shall be deposited with interest at the rate of 6% per annum computed from September 9, 1959, until November 9, 1959, on which date defendant, for the first time, requested a continuance of the trial; thereafter, from May 26, 1961, on which date plaintiff moved for an extension of time to answer the interrogatories, until the date on which said additional sum shall be deposited.

4. It is hereby declared that co-defendants Eufemia Riera Duborg; the Commonwealth, by reason of the complaint filed against Mario Mercado e Hijos for dissolution of *sociedad;* the latter, by reason of the attachment levied to secure the payment of $137,506.20 as income taxes, considering that the Secretary of the Treasury approved a payment plan therefor; and the latter, by reason of delinquent land taxes, considering that it has been proved that these had been paid to June 30, 1960, have no interest whatsoever in the funds deposited; and the elimination of John Doe and Richard Roe is hereby ordered inasmuch as they have no interest whatsoever in this case.

This judgment is entered without costs.

Let this judgment be filed and served.

Entered in San Juan, Puerto Rico, on this 11th day of September 1963.

(s) P. Santos Borges
Judge

I attest:

Clerk

Exhibit M

(SAME TITLE)

Notice of Appeal

To the Clerk of the Superior Court of Puerto Rico, Eminent Domain Section, and to Plaintiff:

You are hereby notified that defendant, Mario Mercado e Hijos, feeling aggrieved by the judgment entered by this Honorable Court in the instant case on September 11, 1963, APPEALS therefrom to the Honorable Supreme Court of Puerto Rico.

The following constitutional questions are present in this appeal:

The judgment appealed from deprives appellant of its property without proper compensation.

The Court, in determining in its judgment that the best use of the condemned property was agricultural, did so against the evidence introduced, without any basis therefor in the record, arbitrarily and capriciously, denying appellant's right, guaranteed by the Constitution of the United States of America as well as by the Constitution of the Commonwealth, to a fair and impartial trial.

In its judgment the Court, disbelieving defendant-appellant's evidence without justification, denied it the due process of law and deprived it of its property in violation of the due process clause of the Federal Constitution and of the Constitution of the Commonwealth of Puerto Rico.

In this case, the condemnation does not constitute a public use as contemplated in the Fifth Amendment to the Constitution of the United States of America incorporated in the Fourteenth Amendment of that same Constitution.

The use of the power of condemnation to deprive an established industry of its source of raw material in order

to later deliver the lands in question to private enterprises for the operation of industrial establishments, is an unlawful exercise of the power of condemnation and the action of the Development Company constitutes a violation of the restriction included in the Act authorizing it to expropriate.

Ponce, Puerto Rico, October 3, 1963.

Respectfully submitted,

PEDRO M. PORRATA and
CHARLES R. CUPRILL
Counsel for Sociedad Mario Mercado e Hijos, Defendant and Appellant

By:

(s) CHARLES R. CUPRILL
Of Counsel
Box 1224, Ponce, P. R.

I CERTIFY: That on this same date I mailed, post paid, a copy of this Notice of Appeal to the Hon. Secretary of Justice of Puerto Rico, counsel for plaintiff-appellee in this case, to his address in San Juan, Puerto Rico. That in this city of Ponce there is a regular and daily mail service between the city of Ponce and the city of San Juan, operated by the Federal Government.

Ponce, Puerto Rico, October 3, 1963.

(s) CHARLES R. CUPRILL
Counsel for Defendant and Appellant

Exhibit N

IN THE SUPREME COURT OF PUERTO RICO

Appeal from the Superior Court, Eminent Domain Section

AP-64-24

COMMONWEALTH OF PUERTO RICO, ETC., *Plaintiff-Appellee*

v.

SOCIEDAD DE MARIO MERCADO E HIJOS, *Defendants-Appellants*

CONDEMNATION

Division composed of Mr. Justice Pérez-Pimentel as Chief Judge of Division, Mr. Justice Blanco-Lugo, and Mr. Justice Dávila

Judgment

San Juan, Puerto Rico, May 13, 1965

The first three errors assigned by appellant were adversely decided to it in *Mario Mercado e Hijos* v. *Superior Court,* 85 P.R.R. 354 (1962), especially considering the withdrawal of the sum deposited by the Commonwealth in order to obtain the declaration of title and delivery of the possession of the condemned parcels.

It remains only to consider the fourth error assigned challenging the weighing of the evidence by the trial court regarding the valuation aspect. Appellant's argument rests on the allegation that the best use of the lands if for residential, not agricultural purposes. However, after reading the opinion delivered, it is apparent that the judge did not merely fix the agricultural value, but that he also considered the increase in this value on account of the possibility that within a reasonable period of time estimated by him at five years, it might be dedicated to industrial or residential development purposes. As usually happens in these cases, the opinion of two informed persons is in-

volved, each one attempting to lay stress on those factors which in his opinion favor his personal conclusion. Although we are free to adopt our own views insofar as evidence of an expert nature is concerned, *Commonwealth* v. *Fonalledas,* 84 P.R.R. 552 (1962), the opinion delivered by a magistrate specialized in these matters, deserves a special deference, especially when it reveals a careful analysis and wise pondering of the evidence. After reading the testimonies of the experts, it cannot be said that appellant was prejudiced in connection with the valuation.

The judgment entered by the Superior Court, San Juan Part, on September 11, 1963, is hereby affirmed.

It was so ordered and decreed by the Court as witnesses the signature of the Acting Chief Justice.

(s) PEDRO PÉREZ PIMENTEL
Acting Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

(Filed: May 26, 1965)

(SAME TITLE)

Motion for Reconsideration

Hon. Court:

Now comes defendant-appellant herein through its undersigned counsel and respectfully states and prays:

1. That on May 20, 1965, an order was entered in this case denying the retention of the mandate.

2. That defendant-appellant moves for reconsideration of said order on the following grounds:

a. In the answer to the complaint in this case substantial questions were raised under the Constitution of the United States.

b. This case involves the condemnation of private property for a so-called public use which always involves a constitutional question under the Federal Constitution.

c. In this case the property is condemned for a use that appellant alleges is not the public use contemplated by the Constitution of the United States, that is, private property is condemned in order to give it to other private individuals for the establishment of private industries.

d. That in this case there is no need to give a bond because the property was delivered to plaintiff-appellee when the complaint was filed and the appeal presents no harm for it.

e. That in this case a substantial federal question is involved.

WHEREFORE, we pray the Hon. Court to reconsider its order denying the retention of the mandate.

Ponce, Puerto Rico, May 24, 1965.

Respectfully requested,

PEDRO M. PORRATA and
CHARLES R. CUPRILL
Counsel for Defendant and Appellant

By:

(s) CHARLES R. CUPRILL
Of Counsel
Box 1224
Ponce, Puerto Rico

(SAME TITLE)

Division composed of Mr. Justice Pérez-Pimentel as Chief Judge of Division, Mr. Justice Blanco-Lugo, and Mr. Justice Dávila

Order

San Juan, Puerto Rico, May 27, 1965

Inasmuch as the constitutional questions referred to by defendant-appellant were waived when it withdrew the sum deposited by the Commonwealth as just compensation, *Mario Mercado e Hijos* v. *Superior Court,* 85 P.R.R. 354 (1962), the motion for reconsideration is hereby denied.

It was so ordered by the Court as witnesses the signature of the Acting Chief Justice.

(s) PEDRO PÉREZ-PIMENTEL
Acting Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

Exhibit O

(SAME TITLE)

(Filed: June 4, 1965, Supreme Court of Puerto Rico)

Notice of Appeal

COMES Now Mario Mercado e Hijos through its undersigned attorneys and serves notice that it appeals to the Supreme Court of the United States of America from the judgment rendered by the Supreme Court of Puerto Rico in Civil Case No. 64-24, Condemnation Proceedings appealed from the Superior Court of Puerto Rico, Eminent Domain Section.

I

Mario Mercado e Hijos, appellant herein, is a partnership organized under the Civil Code of Puerto Rico and it owns and operates a sugar mill known as Central Rufina in the town of Guayanilla, in the southern coast of Puerto Rico. Appellant owns several thousand acres of land for the cultivation of sugar cane to be processed into sugar at the said mill.

The appellee is the Commonwealth of Puerto Rico, plaintiff, in the lower courts, represented by its Governor.

This appeal is taken on the judgment entered by the Supreme Court of Puerto Rico in Civil Case No. 64-24, Commonwealth of Puerto Rico v. Mario Mercado e Hijos, Condemnation Proceedings, on May 13, 1965, and which was notified to the appellant on that same date.

Said judgment was entered by the Supreme Court of Puerto Rico affirming the judgment of the Superior Court of Puerto Rico, Eminent Domain Section, condemning 68.3353 cuerdas of land from appellant and transferring title to the Commonwealth of Puerto Rico.

II

The following portions of the record will be pertinent to this appeal and must be certified by the Clerk of the Supreme Court of Puerto Rico and filed with the Clerk of the Supreme Court of the United States:

1. Complaint filed in the Superior Court, Eminent Domain Section, Motion of plaintiff for immediate acquisition and ruling of the Court.
2. Motion filed by defendant to set aside taking.
3. Transcript of hearing on this motion.
4. Ruling of the Superior Court on the above motion.

5. Writ of Review of the above ruling to the Supreme Court of Puerto Rico filed by defendant.

6. Reply and amended reply filed by defendant in the Superior Court.

7. Interrogatories served on plaintiff.

8. Objections to the said interrogatories.

9. Ruling of the Superior Court on the objections.

10. Writ of Review to the Supreme Court of Puerto Rico filed by defendant.

11. Ruling of the Supreme Court of Puerto Rico on the above Writ of Review (Reported at vol. 85 P.R.R. 354).

11(a). Motion for withdrawal of funds filed by appellant.

12. Testimonial and documentary evidence presented during the hearing of the case including rulings of the Superior Court.

13. Judgment of the Superior Court entered on September 11, 1963 in the case.

14. Notice of Appeal to the Supreme Court of Puerto Rico on the above judgment.

15. Judgment of the Supreme Court of Puerto Rico on said appeal affirming judgment of the lower court, which is the judgment herein appealed from.

16. Motion to withhold mandate filed by appellant before the Supreme Court of Puerto Rico.

17. Ruling of the Supreme Court of Puerto Rico on above motion.

18. Motion for Reconsideration of the above ruling filed by appellant.

19. Ruling of the Supreme Court of Puerto Rico on above motion.

Jurisdiction of the Supreme Court of the United States is invoked under the provisions of Section 1258, par. 2, Title 28 U.S.C.A. The Supreme Court of Puerto Rico has the status of a State Court in matters of appeal to the Supreme Court of the United States (Pub. Law 87-189 (1961)).

The validity of Law No. 99 of April 18, 1952 (Laws of Puerto Rico Annotated, Vol. 23, Sec. 278 (g) and (n)) which authorizes the condemnation of private property by the Governor of Puerto Rico on behalf of the Puerto Rico Industrial Development Company to be sold or leased to private individuals for the purpose of setting industries (tax exempted) on such properties is in issue in this appeal as being repugnant to the Constitution of the United States of America.

III

In this case the Commonwealth of Puerto Rico condemned 70.8397 cuerdas of land on behalf of the Puerto Rico Industrial Development Company in 1959 of which 68.3353 were the property of Mario Mercado e Hijos, appellant herein. The government deposited $121,827.40. The condemned land was to be used by the Puerto Rico Industrial Development Company as an industrial site for tax exempt plants. The government filed a motion for immediate acquisition and possession was given by the Court of Eminent Domain. When the case finally came up for a hearing in 1962 there were several plants already in operation.

Appellant herein raised several constitutional issues in the lower court alleging that the proposed use was not a public use as it is contemplated in the Constitution of the United States of America and that arbitrary action had been taken in the selection of the land to be condemned. As a final defense it was alleged that the compensation deposited was not the just and fair value of the land.

Appellant operates a sugar mill and it raised part of its raw material (sugar cane) on the land condemned. This land formed part of the fields under sugar cane cultivation. To deprive appellant of this land and to give it to a private individual for his own private use, is an abuse of the right to condemn land.

In affirming the judgment of the Superior Court, the Supreme Court of Puerto Rico have held that the use is a public one and the compensation awarded is just and fair. In so doing the Supreme Court has committed error that must be reversed by the Supreme Court of the United States.

A copy of this Notice of Appeal has been served on the Commonwealth of Puerto Rico, appellee, through its attorneys of record, the Secretary of Justice of Puerto Rico, Mr. Hiram Cancio and Mr. Américo Serra, by depositing the same at the U. S. Post Office, Ponce, Puerto Rico, first-class postage prepaid and addressed to their office at Fortaleza St., San Juan, Puerto Rico.

Ponce, Puerto Rico, this 3rd day of June 1965.

PEDRO M. PORRATA and
CHARLES R. CUPRILL
Attorneys for Appellant
P. O. Box 1224
Ponce, Puerto Rico

By:

(s) CHARLES R. CUPRILL
Of Counsel

Exhibit P

(SAME TITLE)

Order

San Juan, Puerto Rico, June 11, 1965

Considering the notice of appeal filed in this case by appellants to the Supreme Court of the United States, the Secretary shall recall from the trial court the original record hereof, for the preparation of the record on appeal referred to in the notice of appeal by said appellants.

It was so ordered by the Court as witnesses the signature of the Chief Justice, who took no part.

(s) LUIS NEGRÓN FERNÁNDEZ
Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

Exhibit Q

(SAME TITLE)

Order

San Juan, Puerto Rico, September 30, 1965

Considering the foregoing motion, the appellant is hereby granted until November 1, 1965 to file before the Supreme Court of the United States the record on appeal of the above-captioned case.

It was so ordered by the Court as witnesses the signature of the Chief Justice, who took no part.

(s) LUIS NEGRÓN FERNÁNDEZ
Chief Justice

I attest:

(s) IGNACIO RIVERA
Secretary

Office-Supreme Court, U.S.
FILED
JAN 5 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1965

No. 786

SOCIEDAD DE MARIO MERCADO E HIJOS,
APPELLANTS,

v.

COMMONWEALTH OF PUERTO RICO, ETC.,
APPELLEE.

CONDEMNATION PROCEEDINGS

MOTION TO DISMISS

J. B. FERNANDEZ BADILLO
Solicitor General
IRENE CURBELO
Assistant Solicitor General
Department of Justice
Office of the Attorney General
San Juan, Puerto Rico

Blanchard Press, Inc., Boston, Mass. — Law Printers

Supreme Court of the United States

OCTOBER TERM, 1965

No.

SOCIEDAD DE MARIO MERCADO E HIJOS,
APPELLANTS,

v.

COMMONWEALTH OF PUERTO RICO, ETC.,
APPELLEE.

CONDEMNATION PROCEEDINGS

MOTION TO DISMISS

TO THE HONORABLE COURT:

Now comes appellee, The Commonwealth of Puerto Rico, represented by the undersigned attorneys, and respectfully submits the following Motion to Dismiss pursuant to Rule 16 of the Rules of this Court.

Statement of the Facts

The facts of this case are correctly stated by appellant in his Jurisdictional Statement. Succinctly, they are as follows:

Pursuant to its powers of eminent domain, the government of the Commonwealth of Puerto Rico condemned

certain lands belonging to the appellant. At several points during the proceedings, appellant objected to the legality of the taking of his land, despite the fact that the Supreme Court of Puerto Rico, on Certiorari from a Resolution of the trial court denying an order to answer certain interrogatories (Appellant's R.A., pg. 31a), the trial court in its final judgment (Appellant's R.A. pg. 42a), and the Supreme Court again, on appeal from the final judgment (Appellant's R.A., pg. 63a) consistently refused to consider such objections for the reason that, according to local law, objections to the legality of a taking are waived when the defendant withdraws the funds deposited by the plaintiff as just compensation. After the withdrawal of the sums deposited, the case was treated by the courts as though it involved only an issue of compensation, since appellant also objected to the sufficiency of the amount deposited. Consequently, the constitutional questions presented to this Court now were never treated by the Supreme Court of Puerto Rico as properly in issue because there existed an adequate ground of local procedure to dispose of the case.

Jurisdictional Questions Presented

The questions involved at this stage of the proceedings are the following:

(1) Is the judgment appealed from based upon a non-federal ground?

(2) Is the non-federal ground adequate to support the judgment?

Argument

Question I

In its opinion on Certiorari from an incident denying the Appellant an order directing the Government to answer certain interrogatories (Appellant's R.A., pg. 31a), the Supreme Court of Puerto Rico discussed the issue raised by appellant concerning the alleged arbitrariness of government officials in selecting his land for condemnation but expressed that it was doing so solely "to clearly establish the rule which should be observed for the purpose of determining the appropriateness of this allegation and its limitations." The Court decided that it is not for it to review administrative determinations of the nature or scope of the right to be acquired by the government, the amount of land to be condemned, the necessity or the adequacy of the place in particular and that the sole concern of the courts is whether the use for which the condemned property is destined constitutes a public purpose. (Appellant's R.A., pg. 35a). In passing, the court mentioned that the condemnation in this case was for "obvious public purposes, that is, for industrial development." (Appellant's R.A., pg. 36a). Despite these statements, the Supreme Court did not treat the issues raised as properly before it. It was only intent on establishing a rule for the guidance of future cases in our jurisdiction. In appraising the situation thus presented, this Court has said that it reviews judgments, not statements in opinions.[1] Consequently, this Court should not consider these statements as the ground on which the judgment below was based. In *Black* v. *Cutter Laboratories*, supra, this Court said: ". . . we should not pass on federal questions discussed in the opinion where

[1] *Black* v. *Cutter Laboratories*, 351 U.S. 292; 76 S.Ct. 824.

it appears that the judgment rests on adequate state grounds."[2]

Question II

The other question with which this Court is faced is whether this appeal should be dismissed because the judgment appealed from is based on an adequate non-federal ground, that is, whether the ruling that Appellant waived his right to raise objections to the legality of the taking when he withdrew the amount deposited by the government as fair compensation for his lands, is a rule of fair and substantial support. If the judgment appealed from is based on a non-federal ground that has fair and substantial support[3] this court, because of a self-imposed limitation, will refuse to review the decision in the merits and will dismiss the appeal for lack of jurisdiction.

The principle that objections to the legality of the taking in eminent domain proceedings are waived if the sum deposited as fair compensation is withdrawn is an adequate ground of decision of which Appellant must have been aware for it is a procedural rule of long usage, even in the federal jurisdiction. In *Winslow* v. *Baltimore & O.R. Co.*, 208 U.S. 59, 28 S.Ct. 190, 191 this Court stated:

> "If the company was without right to take a part of the land of the plaintiffs in error, unless it took more or all, or if the purpose for which the land was sought to be taken was unlawful, the proper course would be to dismiss the petition. This is what the plaintiffs in error originally asked. But, by accepting

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[2] 76 S.Ct. at pg. 827.

[3] *Staub* v. *City of Baxley*, 355 U.S. 313; 78 S.Ct. 277; *NAACP* v. *Alabama*, 357 U.S. 449, 78 S.Ct. 1163; *Wright* v. *Georgia*, 373 U.S. 284, 81 S.Ct. 1240; *NAACP* v. *Alabama*, 377 U.S. 288, 84 S.Ct. 1302; *Barr* v. *Columbia*, 378 U.S. 146, 84 S.Ct. 1734.

> the sum awarded for the land actually taken, they have lost the right to insist that the petition was not maintainable. They cannot ratify the condemnation by receiving the appraised value of the land condemned and then ask to have the condemnation set aside and annulled: . . ."[4]

The same principle is generally followed in the states of the Union.[5] In Nichol's text On Eminent Domain,[6] we find the principle recognized and commented.

> "It is undoubtedly the law that an owner of land taken by virtue of eminent domain proceedings who has accepted and been paid the award of damages cannot afterwards contest the validity of the taking, either directly or collaterally, or seek to recover or retain possession of his land, no matter how fundamental the defect in the proceedings may be."

This rule is part of a broader principle to the effect that one who avails himself of the benefits waives all er-

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[4] See also *Great Falls Manuf'g Co.* v. *Garland*, 124 U.S. 581, 8 S.Ct. 631.

[5] *Georgia: Central of Georgia Ry. Co.* v. *Bibb Brick Co.*, (1919) 99 SE 126, citing *Winslow* v. *Baltimore & O.R. Co., supra; State Highway Dept. v. H-G. Hastings Co.*, (1938) 199 SE 793, 796; *Williams* v. *City of La Grange*, (1957) 99 SE 2d 617, 621, where the Court said: ". . .obviously one can not voluntarily accept the money awarded for his property and still contest the right to condemn."; *Wisconsin: Swan Boulevard Development Corp.* v. *Cybulski*, 109 NW 2d 671, 675 (1961); *Missouri: In Re Condemnation of Land, etc., in Kansas City*, (1915), 176 SW 529, 532; *New York: Weeks-Thorne Paper Co.* v. *City of Syracuse*, (1910) 124 N.Y.S. 317, 321; *Vermont: Harwood* v. *Village of West Randolph*, (1909), 72 A 1076, 1077; *Washington: James et ux.* v. *City of Seattle*, (1910), 106 P 1114, 1115. See also cases collected in Anno. 133 ALR 11, 146-148, supplemented in 93 ALR 2d 465, 520-521, and 29 LRA (N.S.) 1, 21-22.

[6] Vol. 6, 3rd. ed., § 28.321(2), pg. 419.

rors. In *Eustis* v. *Bolles*, 150 U.S. 361, 14 S.Ct. 1831, this Court considered as an adequate non-federal ground the rule employed by the Supreme Court of Massachusetts as a basis for its decision to the effect that by accepting and receiving a dividend in insolvency proceedings a creditor waived the right to object to the validity of the insolvency statutes.[7] In our own jurisdiction it has been held that a person who avails himself of an unconstitutional act cannot subsequently aver its unconstitutionality as a defense.[8]

From what has been said, it is evident that the rule of local procedure invoked by the Supreme Court of Puerto Rico as the basis of its decision is a reasonable rule of long usage, is not an "arid ritual of meaningless form", or a novel local procedure used to evade a constitutional issue.

Appellant argues that withdrawal of the funds could not estop him from litigating questions going to the legality of the taking because, in his Motion for Withdrawal, he expressly reserved to himself the right to pursue such allegations. He states, additionally, that, at any rate, since title and possession of the lands passed to the Commonwealth by court order upon the filing by the plaintiff of the petition and a motion for immediate possession and acquisition, he had already been deprived of the use and benefit of the property when he withdrew the funds.

These are arguments going to the soundness of the rule in controversy and the correctness of its application in this case. Appellant, in effect, is taking this court to revise the decision of the Supreme Court of Puerto Rico upon a question of local law, i.e., whether the rule of

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[7] See also cases collected in 29 LRA (N.S.) 1, to the effect that a right to prosecute an appeal is lost if the benefits under the decree or judgment are accepted.

[8] *People* v. *White Star Bus Line, Inc.*, 45 PRR 148, 155; *People* v. *The Fajardo Sugar Co. of P.R.*, 51 PRR 851, 861.

estoppel became inoperative when a reservation of the right to raise objections going to the legality was made or because at the time of withdrawing the deposit, appellant had been deprived of the use and benefit of the property due to the fact that title and possession of the lands had already passed to the Commonwealth. The first of the two arguments was presented to the Supreme Court in a Motion requesting reconsideration of its judgment on Certiorari from an incident in the trial court concerning interrogatories (Appellant's R.A., pg. 39a), which motion was denied by order dated May 28, 1962 (Appellant's R. A., pg. 41a). The second is presented now for the first time in these proceedings. In any event, these arguments cannot avail appellant here. This court has consistently maintained that if the non-federal ground is not without fair support or so unfounded as to be essentially arbitrary, or merely a device to prevent a review of federal constitutional questions, a state decision will not be reviewed because it misconceives or misapplies a rule of state law. Such misconception or misapplication does not of itself violate the due process clause of the federal constitution.[9]

Even if these arguments could be considered as a claim of a federal right, they cannot be passed upon by this court since they were not asserted below as such by proper pleadings.[10]

WHEREFORE, it follows that the questions raised by appellant are not properly before this Court and, conse-

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[9] *Enterprise Irrigation Dist.* v. *Farmers Mutual Canal Co.*, 243 U.S. 157; 37 S.Ct. 318.

[10] *Atlantic Coast Line R. Co.* v. *Mims*, 242 U.S. 532, 37 S.Ct. 188; *Edelman* v. *People of State of California*, 344 U.S. 357, 73 S.Ct. 293.

quently, appellee respectfully moves this Honorable Court to dismiss this appeal.

San Juan, Puerto Rico, December

(s) J. B. Fernandez Badillo
J. B. Fernandez Badillo
Solicitor General
Irene Curbelo
Assistant Solicitor General
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Office of the Attorney General
San Juan, Puerto Rico

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Supreme Court of the United States

OCTOBER TERM, 1965

No. 786

SOCIEDAD MARIO MERCADO E HIJOS, *Appellants*

v.

COMMONWEALTH OF PUERTO RICO, ETC., *Appellee*

Appeal From the Supreme Court of Puerto Rico

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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TO THE HONORABLE COURT:

Appellant through its undersigned attorneys respectfully submits the following brief in opposition to the motion to dismiss filed by appellee.

STATEMENT OF FACTS

The facts are properly and correctly stated in the Jurisdictional Statement filed by appellant dated November 30, 1965.

JURISDICTIONAL ISSUES RAISED BY APPELLEE'S MOTION

The issues raised by the motion to dismiss are frivolous and have no support on the law or in the cases cited by appellee. The case before this Honorable Court presents Federal questions that could not and cannot be dismissed on an estoppel alleged to have been incurred by appellant, as a result of having withdrawn the funds deposited in court while the case was still pending a hearing before the trial court.

Appellee and the Supreme Court of Puerto Rico, which was the court to raise the issue for the first time on appeal, have overlooked the following facts:

1. The case was before a court of law and not before a jury or assessors as is the case in most of the States.

2. There had been no award for compensation or damages in the case.

3. The motion was conditional and expressly saved the issues raised by appellant in its answer.

4. There was no acceptance of money deposited as compensation for the land taken.

5. Government's counsel made no objection to the motion as drawn.

6. The alleged estoppel, if there is any, is not by itself sufficient to support the judgment of the Supreme Court of Puerto Rico as to all the issues involved.

In Puerto Rico, condemnation proceedings are conducted by filing a complaint before the court of law (General Law of Eminent Domain of March 12, 1903,

as amended). There is no jury or assessors. The judge presiding the court hears the evidence and determines the amount to be paid the owner as just compensation. As a court of law, rulings are made on all constitutional and law issues raised by the parties. The court administratively, upon motion by the condemnor without hearing the condemnee, transfers title to the property on the condemnor and orders that he be given immediate possession of the condemned land by the court's officers. That is the reason why the statute allows, and that is the established practice in the trial court, the condemnee to withdraw the funds deposited with the court without prejudice to his allegations and before final award is made.

It cannot seriously be stated that a motion filed under such circumstances constitutes an acceptance of the sum paid and acts as a waiver of the issues. The record shows that after the withdrawal there was a long hearing as to the amount to be paid and where the constitutional questions were again raised. The conduct of appellant throughout the whole proceedings reveals its clear intention not to waive any issues at all.

Let us analyze the most important cases cited by appellee in its motion:

In Nichols on Eminent Domain, Vol. 6, at page 419, it is stated following the citation made by appellee:

> "In States in which condemnation proceedings are judicial, as the issue of the validity of the taking is determinable in the proceedings themselves, and usually before the question of compensation is passed upon, and the owner is not obliged to file any claim for damages, this question does not ordinarily rise; but it has been held that if the owner goes to trial on the question of damages he cannot,

> on motion for a new trial set up an informality in the preliminary adjudication upon the validity of the taking. When the taking is effected by administrative order, an owner who wishes more compensation than that he has been awarded must file a claim, while the petition for damages assumes the validity of the taking, it does not, according to the sounder rule, preclude the owner from contesting the validity of the taking in separate proceedings."

On page 177, sec. 26.31, it is stated:

> "Generally, where the owner of the property fails to interpose objections to the petition and proceeds with the hearing on the question of compensation, he is deemed to have waived any objection which might properly have been asserted and he may not thereafter assert such objections." (Nichols on Eminent Domain).

The case cited by appellee of *Winslow* v. *Baltimore & O. R. Co.* is not applicable, in the first instance, because in that case the petitioners were asking the court to order the respondent to take more land than they had condemned and alleged that the condemnor had not the authority under the acts (31 Stat. 774 and 32 Stat. 912) to condemn only part of the land; and second, because this objection was raised after the petitioner had accepted as the appraised damages the sum awarded by three persons appointed by the court, which award was confirmed by the court, for the land actually condemned.

The court stated:

> "We think that the position which they now occupy, in place of that which they have abandoned, is untenable. *This proceeding has been allowed to reach its end* (italics supplied). The condemna-

> tion which the petition sought to have made has been made. The land described in the petition *has been appraised,* the compensation to be paid has been deposited with the court and received by the owners."

The court proceeded to consider the entire matter "functus officio."

The case of *Great Falls Mfg. Co.* v. *Atty. General,* 124 U.S. 581, is not applicable. In that case the court stated at page 598:

> "These questions are of great interest, and their examination, in the light of the authorities, might not be altogether unprofitable. But this opinion need not be extended for the purpose of such an examination, for the questions propounded are not material in the determination of the present case. They have become immaterial by the act of the plaintiff in instituting suit against the United States in the Court of Claims. In that suit compensation was sought for its property taken for public use, *while the present suit* (italics supplied) proceeds upon the ground that it has not been lawfully taken, and that it is entitled to be placed in possession thereof. Congress prescribed a particular mode for ascertaining the compensation which claimants of property taken for the purposes taken in the act of 1882 were entitled to receive. It gave them liberty to proceed by suit against the United States before a designated tribunal which, since the passage of the act of March 17, 1866, 14 Stat. 9, has exercised 'all the functions of a court,' from whose judgment appeals regularly lie to this court. United States v. Klein, 13 Wall. 145; United States v. Jones, 119 U.S. 477; Gordon v. United States, 117 U.S. 697. The plaintiff by adopting that mode, has assented to the taking of its property by the government for public use, and has agreed to submit the determination of

> the question of compensation to the tribunal named by Congress . . . "

The case of *Williams* v. *City of La Grange*, 98 S.E. 2d 617, is also inapplicable. In that case condemnation proceedings were involved under the laws of the State of Georgia. The General Assembly of Georgia affords the owner of property to be condemned certain rights in fixing the value of his property, such as that of appointing an assessor, to offer evidence, and to appeal from the award of the assessors to a jury. The sole question which may be passed upon by the appointed assessors or by a jury on appeal is the amount of compensation to be paid to the owner. The Legislature has not expressly provided any method whereby the property owner can contest the question of public necessity or the right of condemnation. The property owner has no remedy except an independent action in a court of equity for relief.

In that case Williams participated in the designation of an assessor on his part and after the award was made and deposited in the court he refused to receive it. He then sued the City of La Grange in a court of equity for relief to enjoin the condemnors. The Supreme Court, Troup County, entered judgment sustaining plea of estoppel and dismissing the petition. The Supreme Court of Georgia reversed and stated at page 621:

> "This court has held in several instances, that if a property owner accepts the award made by the assessors he is estopped. This is unquestionably correct, for obviously one cannot voluntarily accept the money awarded for his property and still contest the right to condemn. The three Justices in ruling that the petitioners in the Fountain case

were estopped followed those cases by holding that payment of the award into court upon refusal of the owner to accept was the legal equivalent of payment, citing in support thereof Code, Sec. 36-602. Clearly, the import of that is that payment into court is equivalent of payment to the owner only insofar as the right to enter upon the property and prosecute the work is concerned. It is not the equivalent of acceptance of the award by the owner nor of payment to him insofar as it affects his right to pursue his remedy in equity."

The case of *Swan Boulevard Development Corporation* v. *Cybulski,* 109 N.W. 2d 671, is not applicable to the facts of this case and its issues. In that case Swan accepted $38,000 of the total award made of $48,000 for a piece of property condemned under the Kline Act of Wisconsin. The money was used by him to pay a mortgage on the property on which it had defaulted and an action for foreclosure was started by the mortgagees. There was a stipulation entered into between the City of Milwaukee (condemnor), Swan and the mortgagees for the withdrawal of the money on deposit with the Clerk of the Circuit Court. Later he filed another motion with the court for payment of the balance.

The court, citing Nichols on Eminent Domain, stated that "an owner of land taken by virtue of eminent domain proceedings who has accepted and been paid the award of damages cannot afterwards contest the validity of the taking either directly or collaterally, or seek to recover or retain possession of his land, no matter how fundamental the defect in the proceedings may be. The acceptance of the amount of $38,000 whether by stipulation or not, is inconsistent with the application for a writ of certiorari which attacks the validity of the very proceedings which determined the award.

It is clear that in this case there was a voluntary acceptance which is the equivalent of a contract to sell or voluntary sale.

The case cited in *Re Condemnation of Land,* 176 S.W. 532, is not applicable. In that case the owner attacked the jurisdiction of the division of the court that tried the case. They raised the issue that the notice stated that the jury would be empanelled at Division No. 1 not at Division No. 2 where the case was finally heard. Later they accepted the money awarded in the judgment and used it to pay assessments made on their property by the City of Kansas. They appeared before the Treasurer of the City and executed an assignment of part of the money awarded as damages in the condemnation as an offset against the amount due by them. They specifically designated the lots to be credited with the payment.

The court stated at page 532:

> "This was a clear and unequivocal acceptance of the benefits of the judgment and a recognition of its validity."

The appellee in this case is trying to circumvent the federal questions involved in this appeal by raising for the first time a so called estoppel and stating that this question of whether the appellant is in estoppel changes the issue into one of local law. Appellee relies on a case that is not applicable. In the case of *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 242 U.S. 157, this Honorable Court was concerned with a judgment based upon two grounds, one involving a federal question and the other not. The non-federal question was the defense of estoppel in pais raised by the Canal Company in the case.

With reference to this defense of estoppel the State Supreme Court had said in deciding the issue for the Canal Company, that "it would be contrary to the plainest principles of equity if plaintiffs might stand silently by, seeing the defendant engage in such a monumental work under claim of right, and utter no word of warning as to their own claims, which, if eventually established, would deprive defendants of the water which the canal was built to carry, condemn the whole enterprise to failure and result in the absolute loss of the money expended. It would be manifestly unjust to allow the plaintiffs after the works were practically finished and the money expended, to insist upon claims which, had they been asserted in good time, would at least have put the defendants upon their guard and have given them cause to pause and hesitate in their expenditures until the validity of their title had been determined." (243 U.S. 163-164; 61 L. Ed. 648).

In other words, the State Supreme Court disposed of the case which had been submitted by stipulation of the parties on the basis of the defense of estoppel in pais. This was clearly a non-federal question.

This Honorable Court, at page 164 (243 U.S.) says:

> "In such situations our jurisdiction is tested by inquiring whether the non-federal ground is independent of the other and broad enough to sustain the judgment. Where this is the case, the judgment does not depend upon the decision of any Federal question and we have no power to disturb it."

Further on, this Honorable Court states at page 164 (243 U.S.; 61 L. Ed. p. 649):

> "But where the non-federal ground is so interwoven with the other as not to be an independent

> matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain."

Referring to the State Supreme Court Decision, this Honorable Court states:

> "In taking up the question of estoppel, as also in concluding its discussion of the subject, the court plainly shows that it is then indulging an assumption that the other ground is not tenable."

Further on this Honorable Court says (page 165):

> "and it may be well to add that the question did not originate with the court. It was presented by the pleadings, was in the mind of the parties when the stipulation was made and was dealt with by counsel and court as a matter of obvious importance."

Are those the facts in the present case? Certainly not. In the present case no such situation was present. The whole case is based on Federal questions properly and timely raised before the trial court and at the Supreme Court of Puerto Rico. The issue of estoppel which appellee tries to raise as non-federal question has to do with the motion to withdraw funds that was filed by appellant with the trial court on February 13, 1961. (Exh. D, Jurisdictional Statement, p. 14a). Such motion in its paragraph 2 states:

> "2. That defendant wishes to *withdraw the aforesaid sum without prejudice to its allegations in this case.*" (emphasis supplied).

This motion was granted by the trial court and no objection to its terms were made by opposing counsel. (Exh. D, Jurisdictional Statement, p. 15a). When the

motion was filed and granted there had not been entered a final award in the case. The allegations to which the motion refers are the issues raised in its answer to the complaint (Exh. C and Exh. DD). One of them refers to the value of the land condemned and the special or legal defenses have to do with Federal questions.

The alleged issue of estoppel was never raised in the pleadings or in the case by the parties. It was the Supreme Court of Puerto Rico, which raised it in its ruling on a petition of certiorari filed by appellant on the issue of discovery under the rules of Civil Procedure of Puerto Rico. The court says:

> "But be as it may, petitioner in this appeal is estopped at this stage of the proceedings from raising the defense we have discussed, since an examination of the record reveals that the withdrawal of the amount deposited by the State as just compensation was sought and the corresponding check for the sum of $121,827.40 was actually drawn in favor of the corporation. This being so, the acceptance by respondent of the amount deposited precludes him from arguing any other issue which does not relate exclusively to the amount of compensation." (Exh. H, Jurisdictional Statement, p. 31a).

The Supreme Court of Puerto Rico made the statement as a dictum in an issue not before it at the time. In its order of May 27, 1965 the Supreme Court of Puerto Rico held that the constitutional questions were waived by the withdrawal of funds. (Jurisdictional Statement, p. 66a).

On this point we wish to point out that the first constitutional question raised in the Notice of Appeal filed with the Supreme Court of Puerto Rico (Exh. M, Jur-

isdictional Statement, p. 61a) was that the judgment appealed from deprived appellant of its property without proper compensation. The notice also raised the issue of public use.

Appellant holds that the issue raised by appellee has no merits. The fact that appellant withdrew the funds pending the final award in the case as to all the issues raised in the answer, cannot have the far reaching effect of converting all the Federal questions involved in the case into one of local ground and preclude appellant from a hearing before this Honorable Court. This is trying to abide by a technicality in the legal process. It is more fair to state that it is appellee who is estopped from raising the issue now before this Honorable Court. Appellee made no objection to the motion of withdrawal of funds and made no issue of it thus inducing appellant into error if there was such.

Furthermore, this issue of estoppel cannot have the effect of converting the Federal questions into a local one by which the whole judgment issued in the case can be sustained.

The motion of appellee should be denied by this Honorable Court.

Ponce, Puerto Rico, this 29 day of January, 1966.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I Certify: That on this same date I mailed, post paid, a copy of this brief in opposition to Mr. J. B. Fernandez Badillo, Solicitor General of Puerto Rico, to his address in San Juan, Puerto Rico. That there is a regular and daily mail service between this city of Ponce and the City of San Juan, Puerto Rico, operated by the Federal Government.

Ponce, Puerto Rico, this 29 day of January, 1966.

CHARLES CUPRILL OPPENHEIMER
One of the attorneys
for Appellant.